Supreme Court of the United States

OCTOBER TERM, 1968

No. 644

BILLY DON FRANKLIN BOULDEN,

Petitioner,

—v.—

WILLIAM C. HOLMAN, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 2303-N

BILLY DON FRANKLIN BOULDEN, By and through his parents, Matt Boulden and Susie Boulden, PETITIONER

vs.

WILLIAM C. HOLMAN, Warden, Kilby Prison, Alabama, RESPONDENT

For plaintiff:

William B. Moore, Jr. (court-appointed), 1201 Bell Bldg., Montgomery, Alabama

For defendant:

Richmond M. Flowers, Attorney General
David W. Clark, Assistant Attorney General, State of Alabama, Montgomery, Alabama

* * * *

DATE	PROCEEDINGS
11/18/65	ORDER that execution of Billy Don Franklin Boulden be stayed; that his petition for writ of habeas corpus be filed in forma pauperis; that respondent show cause on or before 1/15/66 why writ of habeas corpus should not issue, and that William B. Moore, Jr., represent the petitioner in this proceeding.
"	Petition for writ of habeas corpus filed as ordered.
11/23/65	Marshal's return on order of 11/18/65. Personal service on Warden Holman on 11/18/65.

DATE	PROCEEDINGS
1/13/66	Respondent's return and answer and motion to dismiss. (Exhibit "A" to answer [State Court transcript] is record pages 17-381)
1/20/66	ORDER denying motion to dismiss and setting pretrial hearing for 2 p.m., March 25, 1966, in Judge's Chambers. (Copies mailed to Wm. B. Moore, Jr., Richmond M. Flowers and Petitioner Boulden on 1/21/66.)
4/ 6/66	ORDER on pretrial hearing (held on March 25, 1966). Stipulated that issues to be determined at trial are (1) whether confession was voluntarily made; (2) whether reception into evidence of admissions against interest, etc., at time when petitioner was not represented by counsel and when he had not waived assistance of counsel was a denial of constitutional rights. Briefs ordered filed on or before June 17, 1966. Trial set for 10 a.m. on 7/13/66 at 10 a.m. (Copies mailed to counsel.)
7/ 1/66	ORDER continuing trial from its present schedule of July 13, 1966, to 10 a.m., August 3, 1966. Copies mailed to Attorney General, petitioner Boulden, and William B. Moore, Jr., Attorney.
8/12/66	Respondent's brief filed by District Attorney for the Eighth Judicial Circuit of Alabama, R. L. Hundley.
8/12/66	Petitioner's supplemental brief filed by his attorney, William B. Moore, Jr.
8/13/66	Respondent's supplemental brief, filed by David Clark, Asst. Attorney General, State of Alabama.
8/23/66	ORDER denying petition for writ of habeas corpus and dismissing same; and remanding petitioner to custody of State of Alabama. (Copies mailed to Attorney General, State of Alabama, Attorney William B. Moore, Jr., and petitioner Boulden.)

DATE	PROCEEDINGS
8/25/66	Petitioner's motion that his attorney be allowed to take respondent's exhibit No. 1 to his office for transcribing and ORDER granting said motion.
8/29/66	Notice by petitioner's attorney that he is preparing and will file a motion to amend and supplement findings of fact and conclusions of law of the order of this Court dated 8/23/66 and petition for stay of execution.
8/29/66	ORDER staying execution of the death sentence against Billy Don Franklin Boulden; enjoining Warden Holman pending further order of this Court from executing the sentence of death against petitioner. Copy of this order was delivered to Marshal for service on Warden Holman. (Copies mailed by certified mail to Attorney General Flowers and petitioner Boulden.)
8/30/66	Marshal's return on service of order staying execution. Service on Warden Holman on 8/29/66 by leaving copy with O. F. Wells, Assistant Warden.
9/ 2/66	Petitioner's motion to amend and supplement findings of fact and conclusions of law.
9/ 6/66	ORDER denying motion of petitioner presented to this Court on 9/2/66, asking this Court amend and supplement its findings of fact, conclusions of law and judgment made and entered herein on 8/23/66. (Copies mailed to counsel and petitioner Boulden.)
9/ 9/66	Petitioner's application for certificate of probable cause.
9/ 9/66	ORDER granting motion of petitioner seeking issuance of a certificate of probable cause. This order being considered as the "certificate of probable cause." (Copies mailed to counsel and petitioner Boulden.)

DATE	PROCEEDINGS
9/ 9/66	Petitioner's motion for leave to appeal in forma pauperis.
"	Affidavit of petitioner that he is unable to pay the costs of said appeal or give security therefor.
"	ORDER granting leave to prosecute appeal in forma pauperis. (Copies mailed to counsel and petitioner Boulden.)
"	Notice of petitioner, through his attorney, that a notice to appeal is being prepared, appealing from the judgment of the Court made on 8/23/66 and from the refusal to the Court to supplement its findings of fact, conclusions of law and its order, said denial having been filed on 9/6/66 and motion for stay of execution.
"	ORDER staying execution of the order of the Court remanding petitioner to the custody of the State of Alabama, pending the determination of appeal and, further, that the execution of the death sentence be and the same is hereby stayed pending further order of this Court. Warden Holman is enjoined pending further order of this Court from executing the sentence of death against petitioner. (Copies of this order delivered to Marshal for service on Warden Holman. Copies mailed [by certified mail] to Attorney General Flowers and to petitioner Boulden and William Moore, Attorney.)
9/ 9/66	Marshal's return on service of copy of order of 9/9/66. Personal service on William C. Holman, Warden of Kilby Prison, on 9/9/66.
9/13/66	Appellant Billy Don Franklin's notice of appeal to U.S. Court of Appeals. (Copies mailed)
9/13/66	Petitioner's motion for order that transcript be furnished at the expense of the United States.

DATE	PROCEEDINGS
9/14/66	ORDER for transcript to be furnished at expense of U.S. Copies mailed to counsel, petitioner Boulden and Court Reporter.
9/15/66	Court reporter's transcript of proceedings August 3-4, 1966.
10/21/66	Clerk's certificate as to record.

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[fol. 7] IN THE CIRCUIT COURT
OF MORGAN COUNTY, ALABAMA

STATE OF ALABAMA

-vs-

BILLY DON FRANKLIN BOULDEN

TRANSCRIPT OF TRIAL—May 2, 1964

Before Honorable James N. Bloodworth, Judge

* * * *

[fol. 12] THE COURT: In other words, you are charged with three capital cases; that is, cases if the jury imposes the supreme penalty you would forfeit your life. Now, you have a constitutional right to a preliminary hearing; that is, at that time witnesses would be heard for you and for the State before a judge; me, or the County Judge, or the other Circuit Judge, and the judge would decide whether or not there is a probable cause to believe that these offenses have been committed. All there is against you is an affidavit that the Sheriff swore to. You are entitled to, and you, the family listen to this, to a preliminary hearing. That is a trial, in a way, where [fol. 13] the judge decides whether or not there is probable cause to believe that a crime has been committed and if one has been committed that you are the person that did it, and the judge also decides whether or not you are entitled to bond or will have to stay in jail until your trial. Now, that is not a trial, exactly. That is a preliminary hearing. Now, also, besides that, you have a right to apply for a writ of habeas corpus, which is a legal word, but means that you can seek your release. It accomplishes most of the same things that a preliminary does. It's just another way to get there; another road. Also, you have a right, a third right, to apply for bail, to ask a judge by petition to give you bail, a reasonable bail. You have a right, under the constitution, to have a lawyer to represent you if you choose to hire one of your own choice. If you don't choose to hire one, unable, if you are too poor to hire one, then the Court appoints one

for you at the State's expense. That lawyer would either be appointed by the other Circuit Judge, Judge Powell, or myself. This hearing today is not to appoint a lawyer, but to explain to you your rights. You also have a right, a privilege, under the constitution, against self incrimination; that is, you do not have to say anything to the Court today or any other time, or any officers of the law or anybody, say anything that might tend to incriminate you; that is, something that might connect you with these offenses. You don't have to say that, you understand. You can claim your privilege against self incrimination. You can claim you don't want to say anything and you have a right to that. You also have a right, a privilege, against unreasonable searches and seizures; that is, you don't have to submit to, nor can any evidence secured by unreasonable searches or seizures be used against you in a court of law.

* * * *

[fol. 17] THE COURT: I am not asking him to plead or anything. I am just telling him what the charge is against him. So he hasn't lost any right by not having a lawyer here, but if he wanted one here I would be glad to have one and that is why I sent you that message. I believe I asked the Sheriff to have you all here if you would like to be and also to have a lawyer if you desired.

* * * * *

[fol. 100] LT. E. B. WATTS, being duly sworn, testified in behalf of the State as follows:

* * * *

[fol. 154] MR. HUNDLEY:

Q Did you listen to the tape as it was recorded?
A I did.
Q How many times, in your judgment?
A Oh, ten or twelve times.

THE COURT: The question is, you might get into hearsay if he didn't hear the whole conversation.

MR. HUNDLEY: He said part of the oral conversation.

THE COURT: Did you hear all of this as put down there?

A Yes, sir.

THE COURT: You aren't just testifying from something you heard from a tape?

A No, sir, I heard it,—all of it.

MR. CHENAULT: Did you hear the conversation in toto as it was put on the tape this was transcribed from?

A Yes, sir.

MR. CHENAULT: You heard all the conversation as it went on the tape?

A Yes, sir.

MR. CHENAULT: As it went on the tape?

A Yes, sir.

Q And was the tape recording made on the scene and at the place where this alleged crime occurred?

A Yes, sir, it was.

Q And it was all in your presence?

[155] A All of the actual recording was not in my presence.

THE COURT: I'm asking only about everything that is on that paper. Was that in your presence?

A Yes, sir.

MR. HUNDLEY: Was that said in your presence?

A Yes, sir.

MR. CHENAULT: Was what is on this paper taken from the tape? Was that transcribed,—is that a transcription of the tape?

A Yes, sir.

MR. CHENAULT: All right, then it wasn't in his presence.

THE COURT: You heard it, didn't you?

MR. HUNDLEY: Did you have a piece of equipment on you concealed?

A I did.

Q Did you have a wireless microphone?

A I did.

Q Was that an FM wireless microphone about that size to broadcast from where you were to a receiver?

A Yes, sir.

Q Is it possible in the use of that receiver to take what comes off of the receiver and put on a tape recorder?

A Yes, sir.

Q Was that done on this occasion?

A Yes, sir.

MR. HUNDLEY: At a later time we will offer the tape itself. At this time we offer the transcription of it, made under his supervision and direction.

MR. CHENAULT: We object, and I'll ask you, did you advise the defendant you had your wireless microphone and a tape record was being made of this conversation at the time it was being made?

A No, sir.

MR. CHENAULT: We object to the introduction of the transcription of that conversation, secreted and strictly in secret from the defendant.

[fol. 156] THE COURT: The Court will overrule that on that ground, and states the Court understands that this conversation took place at or about the same time that the predicate was laid showing the voluntariness of it, and the Court holds that this evidence introduced showing voluntariness previously extends to this period, and I overrule the objection.

MR. CHENAULT: The defendant excepts, and we move for a mis-trial, on the same grounds.

THE COURT: Motion overruled.

MR. CHENAULT: We except.

Q Read to the jury the first one, please. This is the one to clarify, where he told you about it as you came into the woods? Is that right?

A Yes, sir, these start after we have arrived at the scene.

Q As depicted by these two pictures?

A After we have arrived in the woods, yes, sir.

Q Read the first one.

MR. CHENAULT: We object to him reading the statement.

THE COURT: Objection overruled.

MR. CHENAULT: We except.

MR. HUNDLEY: That is a carbon copy we are offering in evidence.

MR. CHENAULT: We further object to the witness reading from the copy he has that is not in evidence.

MR. HUNDLEY: We withdraw the ones we offered, and offer the Lieutenant's, as No. 29.

THE COURT: All right. They are exact copies, are they?

MR. HUNDLEY: Yes, made at the same some on the same machine.

THE COURT: Objection overruled.

MR. CHENAULT: We except.

Whereupon, the witness proceeded to read the statement, which is identified as State Exhibit 29, which is in words and figures as follows:

WILLIAMS: Now, is this about where you met him?

DEFENDANT: Somewhere along in here.

WILLIAMS: Now, I tell you what, to help refresh your memory we found a piece of leather lying here that came off his holster, that little old bitty [fol. 157] strap.

WATTS: And there was a lot of scuff marks in the road here.

DEFENDANT: This is probably—it was somewhere right in here.

WATTS: Right in this area here?

WILLIAMS: All right, when y'all met him what happened?

DEFENDANT: Let me see. I was coming up this side.

At this point in the reading of the statement, Mr. Hundley interrupted the reading with the following questions:

Q You saw him as well as heard him?

A Yes, sir.

Q Can you show where that part of the conversation is going on on either of those?

A We were at this point, and he said he was coming up this side of the road. He indicated it, stepped over there.

Q Go on with your reading.

The witness continued reading the statement, as follows:

WILLIAMS: All right, let me get over here by him.

(Here the witness stated: "To clarify as I said before, this is the first time we were there.")

DEFENDANT: I was coming in here. He was standing here and, step over.

WATTS: Just assume I was the officer, Hays.

DEFENDANT: He was walking on that side over there.

WATTS: Walking along on your right, meeting you, facing you?

DEFENDANT: He was coming along here about this water hole down here. He stepped over on this side.

Here again Mr. Hundley interrupted the reading of the statement with the following question:

Q [redacted] stepped?
A Yes, stepped over.

Witness continues reading statement:

WATTS: Stepped over on the other side of the road next to the creek?

DEFENDANT: He stood there and was talking. Then he said, and then he took and said. . .

WATTS: What did he say, if you remember, if anything?

DEFENDANT: After he started talking he took and said, "Y'all came and go with me", or something.

WATTS: Did he ask you anything, what you are doing here, or anything? What did he say?

DEFENDANT: He asked me he say, "What have you been doing down here? You all ain't supposed to be up here", or something like that, and then he say, "You all come and go with me." Then he put his hand on his hip, like this here, and when he did that she started hollering, then that's when . . .

(Mr. Watts, the witness stated: "And he indicated by putting both hands on his hip.")

WATTS: Do you remember what she said?

[fol. 158] DEFENDANT: She started hollering.

WATTS: Then what took place then?

DEFENDANT: That is when it happened.

WILLIAMS: That's when what happened?

DEFENDANT: When me and him got into it, or at least I should say when I shot him.

WILLIAMS: What did you shoot him with?

DEFENDANT: My gun.

WILLIAMS: What kind of gun was it?

DEFENDANT: It was a 22.

WILLIAMS: What kind of 22?

DEFENDANT: An automatic.

WILLIAMS: What color was it?

DEFENDANT: Black, I reckon you would call it, black and white handle.

WATTS: It was black with a white handle?

DEFENDANT: Uh huh.

WILLIAMS: All right, now you were standing here and he was standing there? How far apart?

DEFENDANT: Something about like this.

WILLIAMS: About four feet apart?

DEFENDANT: (No answer that was audible.)

WATTS: Where did you have the pistol, Billy?

DEFENDANT: In my right pocket back there.

WATTS: In your right rear pocket?

DEFENDANT: I think I was standing like this here.

WILLIAMS: You were standing with you hand on your hip, or with your hand back on your back pocket?

DEFENDANT: I am not too certain. It was something like that. Anyway, when she started like that she jumped behind him and started hollering, and he took and "retched" (reached) or something. Anyway, he made a slight fast move, you know, and when he did that, I started shooting at him. He took and was still trying to get his gun out. Mine stopped —I took—

WILLIAMS: Your gun stopped shooting?.

DEFENDANT: Yes.

WILLIAMS: All right, go on.

DEFENDANT: After I saw he could not get his'n out, I jerked his'n and it came on out of the holster.

WATTS: You jerked his gun off of him then?

DEFENDANT: Um, hum.

WILLIAMS: What did you do then?

DEFENDANT: After it came out of the holster, I think I must have kept shooting. I kept shooting.

WILLIAMS: You kept shooting with what?

DEFENDANT: His'n.

WILLIAMS: His gun? You were shooting at him with it?

DEFENDANT: I was shooting at him with it I reckon.

WILLIAMS: Shooting at him with his own gun?

DEFENDANT: He took and got up on me—I couldn't—I was trying to get back off of him.

WATTS: Was he squeezing you or something?

DEFENDANT: Naw, I don't reckon he was.

WATTS: You say he got on you? What do you mean by that?

DEFENDANT: He got real close up on me. I was trying to get back off of him kinda like that.

WILLIAMS: Do you think you hit him with his gun?

DEFENDANT: Yes, I think so.

WATTS: You think you did?

WILLIAMS: But you think you might have missed him?

DEFENDANT: I might have.

WATTS: Then what happened after you started shooting at him with his gun?

DEFENDANT: After he got closer that's when I—. He took and almost knocked me down and when he did that I dropped it and that's when I grabbed my knife.

WILLIAMS: You dropped what?

DEFENDANT: I dropped his gun.

WILLIAMS: That was when you grabbed your knife?

DEFENDANT: Um huh.

WILLIAMS: Where was it?

[fol. 159] DEFENDANT: In my pocket.

WATTS: Your right front pocket?

DEFENDANT: Yes, sir.

WILLIAMS: What did you do then?

DEFENDANT: I started sticking him with it.

WATTS: Where did you stick him first?

DEFENDANT: (Answer not audible).

WILLIAMS: Take Watts there and stick Watts just like you were sticking Watts where you done it.

WATTS: In front or behind?

DEFENDANT: He was standing like that; he was pretty close. I was sticking him like that.

WATTS: When you reached around him did you stick him?

DEFENDANT: Somethin' like that.

WILLIAMS: You were reaching around him sticking him like that in the back, son? (Witness: Let me read that back.) (Reads question back.)

DEFENDANT: Yes, sir.

WILLIAMS: You was that close on him?

DEFENDANT: He was right up on me then.

WILLIAMS: Where else did you stick him, if anywhere, besides the back?

DEFENDANT: Well, I don't know. I hit at his head a time or two.

WILLIAMS: You hit at his head?

DEFENDANT: Yes.

WATTS: With your knife?

DEFENDANT: Yes.

WILLIAMS: Whereabouts on the head?

DEFENDANT: Around the neck.

WILLIAMS: Around the neck?

DEFENDANT: Yes.

WILLIAMS: Well, what happened then?

DEFENDANT: I just kept on—well, you know, we moved out of this spot here.

WATTS: Scuffled in which direction?

DEFENDANT: Back towards the road.

WATTS: Back up towards the road in back up behind me?

DEFENDANT: Um hum. After he got up younder he fell.

WATTS: You were still following along there with him? Still scuffling?

DEFENDANT: Yes, me and him were going on up the road. After that happened I took off and ran. I came back up, let me see—

WATTS: You went back up through the woods up this way—how far?

DEFENDANT: (No answer).

WILLIAMS: What did you do with the gun?

DEFENDANT: I remember stopping up there somewhere.

WILLIAMS: Take us to it.

WATTS: Do you think you can show us where you stopped and put it?

DEFENDANT: Let's go back up there.

WILLIAMS: You take us to that gun. We ain't going to say anything else to you. You get your mind off of it, and take us to that gun.

A And that is the end of that, and we left the scene.

* * * *

[fol. 161] Q The second statement you have there that was offered,—am I correct in saying that was made after you had gone with him in a Westerly direction, on down to the still site, and you had had a conversation with him down there, and he had told you what had transpired down there with Mrs. Burnett?

A Yes, sir.

Q And you came back?

A Yes, sir.

Q And when you came back to point F and point E here you went through the same thing again?

A Yes, sir.

Q And that is the statement you are going to read there?

A Yes, sir.

Q Is that right?

A Yes, sir.

Q Go on and read it

MR. HUNDLEY: It's offered as Exhibit 30.

At this point the witness read the statement referred to above, in words and figures as follows:

WATTS: Did she cry any?

DEFENDANT: No.

WATTS: Oh yes, I want to ask you how you got through these mud holes. I believe you told me a while ago they were full of water?

DEFENDANT: I walked up on the edge.

WATTS: You walked up on the edge of the bank?

DEFENDANT: Yes.

WATTS: Did you hold hands?

DEFENDANT: No.

WILLIAMS: When you were walking around, did you come right around a blind spot, right around a curve from where you met Mr. Hays aint it?

DEFENDANT: About right along right here.

(MR. HUNDLEY: Was that about where you have it marked in your picture?

WITNESS: Yes, sir, about where the front arrow is on the picture looking East.)

WILLIAMS: Right along here is when he first come into view?

DEFENDANT: Yes, sir.

WATTS: About the edge of this mud hole?

DEFENDANT: Yes.

WILLIAMS: Where did you stop?

DEFENDANT: Right along in here.

WATTS: About eight or 10 feet from the mud hole?

DEFENDANT: I don't know, sorta back up just a little bit.

WILLIAMS: All right. Now Billy, I'm Mr. Hays.

WATTS: Which side was the girl on?

DEFENDANT: Here.

WILLIAMS: My gun is unloaded, so I want you, [fol. 162] Billy, to shoot me with your finger for your little gun. I am Mr. Hays, and I want you to jerk my gun off of me, just like you did Mr. Hayr and do him with my gun like you did with Mr. Hays'.

WATTS: His gun is unloaded.

WILLIAMS: My gun is unloaded. You won't hurt me. All right. How far was Mr. Hays from you, like I'm him? You get back and place me and you like you were.

DEFENDANT: She was standing long 'about here.

WATTS: And the girl was right along here. Um um.

DEFENDANT: Ugh, he was standing there talking.

WILLIAMS: How was his hands?

DEFENDANT: His hands were down. He was standing talking.

WILLIAMS: Just like I am—like this.

DEFENDANT: And then he took—and then he said "You all come and go with me."

WILLIAMS: He said "You come and go with me?

DEFENDANT: Something like that.

WATTS: Talk up a little. I'm a little bit hard of hearing.

WILLIAMS: Like that?

DEFENDANT: Something like that. I don't know. Then she started hollering.

WILLIAMS: She started hollering?

DEFENDANT: He took and went—jumped, and when he did I took and POW! POW!

(MR. HUNDLEY: What if anything did he do with his hands?

WITNESS: He indicated that he was shooting.)

WILLIAMS: How many times did you do it? Keep doing it as many times as you think you done it. Keep BAM BAM as many times as you think you done it with your finger. There, that's your little pistol. Go on.

DEFENDANT: I don't know how many times it was.

WILLIAMS: Well, just do it as many times as you think you did.

DEFENDANT: It was about —

WILLIAMS: And then do the next thing after that. Now, go on through it just like it happened. Just grab my gun, and do everything just like you did. Go on and shoot me with the little pistol just as many times as you did and then come on. I will be standing here like him. He was standing here something like this.

DEFENDANT: I said BAM! BAM! He reached —that's the way it was, something like that.

WILLIAMS: Now go on with that gun. Go on off—was it like that? CLICK! CLICK! CLICK! CLICK!

(WITNESS: He pulled the trigger four times, like that.)

DEFENDANT: It was something like that. Not quite that way.

WILLIAMS: You were shooting it like that— right through here and around?

DEFENDANT: Yes, sir, something like that.

WATTS: You just kept shooting it after he grabbed you. Um huh.

DEFENDANT: Ha Ha—Heh Heh Heh.

WATTS: Then after his gun emptied, were you all still fighting? What happened then?

WILLIAMS: Go on now, you still have my gun. Don't throw it hard, but lay it like wherever you did with his. You done shot me. You done shot it empty now.

DEFENDANT: I don't know where I dropped it. Anyway I dropped it. We were scuffling and I got my knife right here.

WILLIAMS: All right, drop the gun. Drop that now.

DEFENDANT: I came up with my knife and he was right up on me and I started sticking him like this.

WILLIAMS: Like this?

DEFENDANT: Something like that.

WATTS: In his left shoulder kinda.

DEFENDANT: Something like that.

[fol. 163] WILLIAMS: Is that the way he had you?

DEFENDANT: No, not quite that way.

WILLIAMS: Place me like it was. Place me like he had you?

DEFENDANT: I don't know how it was.

WILLIAMS: The best you can?

DEFENDANT: It was something like that, sir.

WILLIAMS: Go on and finish me off. I ain't dead yet.

DEFENDANT: I don't know.

WATTS: Go on. You have not got a knife in your hand, you are just making believe that you have one.

DEFENDANT: Well, he kept on getting so close. I could not get away from him. I just took and hit him, and cut him in the neck.

WILLIAMS: Hit him? Whereabouts? Hit me! Hit me! Go on!

DEFENDANT: In the neck. It was something right in here.

WILLIAMS: Go on and cut it! Cut it!

DEFENDANT: I hurt my finger.

(MR. HUNDLEY: What sort of gestures did he make with his finger when he indicated he took and hit him?

WITNESS: He just punched at Williams' neck.)

WILLIAMS: You won't hurt your finger, cut it just like you done, was it something like this?

DEFENDANT: I don't know. It was something like that. I don't know. I don't know how it was.

WATTS: Then what happened?

DEFENDANT: That wasn't right here though.

(MR. HUNDLEY: You all had been standing whereabouts? Show on that sketch where you all had been standing.

WITNESS: Point F, where he first met Mr. Hays.

MR. HUNDLEY: That's where most of this conversation took place?

WITNESS: Yes, sir.

MR. HUNDLEY: Did you move any from there?

WITNESS: Yes, we progressed then on up to Mr. Hays' body, where it had been.)

WATTS: You were scuffling all that time and you'd advanced up there?

DEFENDANT: It was back up there somewhere. It was on the other side of that man.

WATTS: You scuffled up this way towards where he fell. Let's walk on up that way then.

DEFENDANT: He fell somewhere around there and when I came back, he was laying up beside that tree.

WATTS: Wait a minute now, you are getting ahead of yourself I believe. When you say you came back, you still had his gun in your hand?

DEFENDANT: No, it was laying back on the ground.

WATTS: Ah, all right. You dropped it and got your knife?

DEFENDANT: Um hum.

WATTS: Now where was your gun?

DEFENDANT: That's what I don't quite remember, where mine was at.

WATTS: You remember having it any more after this?

DEFENDANT: Not after that. I don't remember having it, not that I can remember.

WATTS: But you don't think it could have flipped back there in that mudhole?

DEFENDANT: I don't think so.

WATTS: I believe you told us earlier that you may have thrown it in the creek. Do you think you could have thrown it that far? It is about 100 feet. Thick trees.

[fol. 164] DEFENDANT: Hundred feet?

WATTS: Do you remember that now? Throwing it?

DEFENDANT: You see a little old rock out there?

(WITNESS: And he began to look for a rock.)

WATTS: Go ahead and try a rock. Of course a rock . . . .

(WITNESS: There was an airplane passed over, and for about a minute it was inaudible. Then the airplane passed over again, and there was noise.)

WILLIAMS: All right see if you can throw that rock in the creek from here.

(Witness: More airplane noises.)

WATTS: See that one hit a limb.

DEFENDANT: It just ain't heavy enough.

WATTS: Do you think you could have throwed that pistol that far—into the creek?

DEFENDANT: I don't know whether I throwed it that way or what.

WATTS: Do you remember trying to throw it?

DEFENDANT: I don't remember throwing but the next day I remember my arm was still sore. I don't know whether that had anything to do with it or not.

WILLIAMS: Now, you said while ago after you cut him down, it was—. Show me where the last place you cut him was—in the road here. How far up this road?

DEFENDANT: It was a pretty good piece on up there 'cause we messed around here for—

(WITNESS: And he stopped talking.)

WILLIAMS: I mean the last place you cut him.

DEFENDANT: I don't remember the last place.

WATTS: On up here 'cause that's where he fell.

DEFENDANT: Somewhere up there 'cause he, you know, he took and turned me loose and staggered and fell.

(MR. HUNDLEY: Whereabouts on this sketch was he indicating at that time? Show the point.)

WITNESS: He was indicating just before he got to the body, about two-thirds of the way up. He said he staggered and fell there.)

WILLIAMS: He turned you loose and staggered and fell?

DEFENDANT: Yes.

WILLIAMS: All right. Is that when you went back to pick up the stuff?

DEFENDANT: I think it is.

WILLIAMS: Is that when you went back and picked up the stuff and went up through the woods?

DEFENDANT: Yes, I think so.

WILLIAMS: And then you come back down to the car and got your car and left, got out yonder to the bridge and drove back to him, got out and come up to him where he was laying up there by the tree and that is when you got his billfold?

DEFENDANT: Yes sir.

(MR. HUNDLEY: I wonder if you would read that again, because I interrupted you.) (Witness repeats last question and answer.)

WILLIAMS: All that's right?

DEFENDANT: Yes, sir.

WILLIAMS: Hadn't nobody bothered you or anything have they Billy?

DEFENDANT: No, sir.

[fol. 165] WILLIAMS: We hadn't mistreated you at all have we?

DEFENDANT: Un um.

WILLIAMS: We haven't promised that you would get out light or threatened have we. You told us all on your own free will didn't you?

DEFENDANT: Yes sir.

WILLIAMS: Do you feel sorry you told us anything?

DEFENDANT: No sir.

WILLIAMS: We haven't offered you any threats or rewards or anything for telling us this have we?

DEFENDANT: No sir.

WATTS: Has anyone scared you?

WILLIAMS: And this is May 7, 1964. It is now fifteen minutes til six (5:45) in the afternoon. Right?

DEFENDANT: Yes sir.

DEFENDANT: I feel a lot safer with my handcuffs back on. Ha! Ha! Ha! Ha!

WILLIAMS: You know what? I have done messed up on the day. It is May 6.

WATTS: I have a calendar.

WILLIAMS: Get it out and see, by gosh. This is —. Hell, I have been going night and day so long without sleep.—

WATTS: This is a 1964 calendar. May, and what day of the week is it? I am like you I am confused.

DEFENDANT: Today is the 7th.

WATTS: Today is Wednesday. I do remember that.

DEFENDANT: Today, Wednesday?

WILLIAMS: Yes, today is the 6th, because tomorrow is the day the Grand Jury meets. The seventh.

WATTS: Yes, that's right.

WATTS: Then you all scuffled on up to where he was found and you left?

DEFENDANT: Yes, sir, and that is where I took and—

WATTS: I wish you could remember where that gun is.

DEFENDANT: I wish I could remember to where it is at.

* * * *

Q Step down here, if you will, and show the jury what sort of movements and gestures he was making on Captain Williams' body, using his finger as the gun or the knife.

MR. CHENAULT: We object to such demonstration. It's prejudicial, and invades the province of the jury.

THE COURT: Objection overruled.

MR. CHENAULT: We except.

A He said they were about three or four feet apart, when the girl broke and run around him one way or the other,—I don't recall how he indicated that,—he jerked his little pistol out and Bam! Bam! Bam!, and that Mr. Hays kind of jumped forward and grabbed his stomach, and he continued shooting the gun till it emptied or stopped shooting, and he jerked Mr. Hays' gun off of his side, and that's when he thinks he threw his down or dropped it, and that's when Mr. Hays came after him, and he grabbed his gun from under his arm, and began scuffling with him, and he took his knife and began stabbing like this indicates on the head and throat.

* * * *

[fol. 209] SUSAN DIANNE BURNETT, being duly sworn, testified in behalf of the State as follows:

DIRECT EXAMINATION

BY MR. DOSS:

* * * *

[fol. 234] Q How long were you down there about a hundred feet from the road before you started having intercourse?

A Just as soon as we got there he told me to pull my clothes off.

Q What clothes did you have on?

A I had on a blouse and some shorts.

[fol. 235] Q Now, were they regular shorts or short shorts, or what kind?

A They were regular shorts.

Q What color were they?

A Blue and brown and white checked.

Q What did you pull off, if anything, when he told you to pull your clothes off?

A My shorts and under-clothes.

Q All of your under-clothes?

A No, sir.

Q What did you pull off?

A My shorts and panties.

Q What, if anything, did you do with your clothes?

A He told me to lay them on the ground and lay on them.

Q And is that what you did?

A Yes, sir.

Q Then what did he do?

A He laid the gun down by his foot and pulled his pants below his knees.

Q Laid the gun down by his foot and let his pants down below his knees?

A Yes, sir.

Q Then what did he do?

A He picked the gun up. He laid it down and picked it back up.

Q Did he do anything else between the time he laid the gun down and picked it up?

A I didn't see him do anything else.
Q Did he use a rubber?
A Yes, sir.
Q When did he put that on?
A When I laid down I wasn't watching him. After he pulled his pants down I didn't watch him.
Q Did you tell him to use a rubber?
A No, sir.
Q And you wasn't watching him,—you didn't watch him all the time?
A When he pulled his pants down I didn't watch him. [fol. 236] I figured he was putting on a rubber, but I didn't watch him.
Q How many did he use?
A Two.
Q How many times did you have intercourse?
A Two, I guess.
Q How long was it between the first time you had intercourse and the second time you had intercourse?
A I guess we laid there about fifteen or twenty minutes, and he got up and pulled it out and put on another one and laid back down.
Q After you had intercourse the first time you laid there about fifteen minutes, and he got up?
A No, sir, we had intercourse about fifteen or twenty minutes, and then he got up and put another rubber on and laid back down. He stood up by a tree about a half a minute.
Q You tell this jury it was about a half a minute interval between the first act of intercourse and the second act of intercourse?
MR. HUNDLEY: We object. That isn't the testimony of the witness.
THE COURT: Objection overruled. If that isn't right you can tell him; if it is you can tell him it is right.
Q Is that right?
A Will you ask it again?
Q Was there about half a minute interval between the first intercourse and the second act of intercourse?
A Well, yes, sir.
Q About half a minute?
A Yes, sir.

Q After you had intercourse the second time, what, if anything, did he do?

A He took it off and went over there and picked up the papers he took it out of.

Q I beg your pardon?

Q He picked the little old tin-looking paper up the rubbers was in. I thought he throwed them in the creek, —and told me to put my clothes back on, and I did.

[fol. 237] Q And he went over, and with the rubbers in a tin-looking thing, you through he threw them in the creek?

A Whatever he took them out of, I thought he throwed it in the creek.

Q What were you doing?

A I was putting my clothes back on.

Q You tell us how long a period of time was it from the time you took your clothes off till you put them back on?

A It seemed like about thirty-five or forty minutes.

Q And other than about a half a minute in between the acts of intercourse, you and he were having intercourse during that thirty-five or forty minutes?

A Yes, sir.

Q After you got your clothes on what, if anything, did you do?

A Well, he put his hand back on my shoulder and told me, "Let's go".

* * * *

[fol. 281] MR. HUNDLEY: That is all from Lt. Watts except in connection with the audio portion of the tape we referred to earlier.

THE COURT: Gentlemen of the jury, it becomes necessary for the Court to listen to a tape recording before it is played in your presence, and to let the defendant make any objections he wishes to make, and the Court will have to hear it. I am advised it will take approximately thirty minutes to play this. For that reason we are going to recess you.

At this point the Court instructs the bailiff to keep the jury within the building, and together, while the tape is being played out of their hearing. The bailiff proceeds

to take the jury out of the courtroom, and the Court, Solicitors and defense counsel and Reporter retire to a witness room.

THE COURT: We have retired to a witness room out of the presence of the jury, and the court is recessed until the Court, the Solicitors and defense counsel hear the transcript. The machine is operated by Lt. E. B. Watts, who has formerly testified in the case, and the same being [fol. 282] the same testimony as Exhibit 30 first, and Exhibit 29, and it is the contention of the State that the transcript is the same as has been introduced.

Mr. Watts proceeded to play first the tape of State Exhibit 30, and then the tape of State Exhibit 29, after which the following occurred:

THE COURT: Do you have anything you want to say, Mr. Chenault?

MR. CHENAULT: We object to the playing of the recordings before the jury, in the presence and hearing of the jury, and assign for grounds: First: That by prior testimony of the State Investigator, the recordings were not taken voluntarily; that the microphone was secreted on the person of the State Investigator, E. B. Watts.

Second: That the defendant was not advised nor *appraised* of that fact; that he had no knowledge of the fact there was a tape recording being made of his conversation or conversations with either E. B. Watts or Capt. John Williams, who is a State Trooper, present along with Watts, and we object on the grounds it wasn't a voluntary recording.

Third: We object on the grounds that a portion or portions of the recordings are inaudible and not understandable, and that if the recording or recordings or tape or tapes are played in the presence and hearing of the jury the jury will not be able to hear a complete and total recording; that only fragments of it would be audible to the jury, and we object to the playing of any portion thereof on the grounds assigned.

THE COURT: Motion overruled. I think it's admissible under the cases we have looked at, and in view of the fact there is a transcript of each of these recordings,

[fol. 283] which have been authenticated by prior testimony, that it removes the questions relative to the inaudibility of portions of it, in my opinion. He also testified, I think, independent of the transcripts as to what transpired at the time and place, which also forms another foundation for the admissibility of it relative to that inaudibility.

MR. CHENAULT: We reserve an exception.

Whereupon, the Court, Solicitors and defendant's attorney returned to the courtroom. The jury also returned to the jury box, and the trial proceeded as follows:

THE COURT: We have concluded that we would allow the playing of the tape recording in your presence. This is the tape recording which, according to the State's theory, is the basis for Exhibits 29 and 30, which you will have transcribed in typewriting, with you when you retire to the jury room, and the State is offering these two transcriptions in evidence at this time. You may proceed now.

MR. HUNDLEY: We would like to say the first one that is played is Exhibit 29. That was made as the officers and the defendant entered the area the first time; and Echibit 30 will be the one made on their return.

THE COURT: All right. You may proceed.

Here the first recording referred to above was played by Mr. Watts.

THE COURT: That concludes Exhibit 29, at least the tape on which Exhibit 29 is based. You will have No. 29 with you, and now the operator of the machine will play Exhibit 30, which you will also have with you, and which has been transcribed according to the testimony which you will also have with you.

[fol. 284] Here the second tape recording was played by Mr. Watts.

THE COURT: Gentlemen, that is all of the transcription.

MR. HUNDLEY: The State rests, Your Honor.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 2303-N

BILLY DON FRANKLIN BOULDEN, By and through his parents, Matt Boulden and Susie Boulden

vs

WILLIAM C. HOLMAN, Warden, Kilby Prison

TRANSCRIPT OF HEARING—August 3-4, 1966

Before Hon. Frank M. Johnson, Jr., Judge, at Montgomery, Alabama

* * * *

[fol. 15] DR. RONALD HAMBY, witness for Petitioner, having been duly sworn, testified as follows:

* * * *

[fol. 30] REDIRECT EXAMINATION:

BY MR. MOORE:

Q Doctor, based on your examination, do you have an opinion as to his basic personality more than two years ago, we'll say?

A Yes, sir.

Q In your opinion, if this man were faced with what he though was a life or death situation and was offered what he thought was an out, even though temporary, what would be his reaction?

A He would take it.

Q Would this include doing or saying whatever he [fol. 31] thought someone else wanted to hear that he thought was in position to help him?

A Yes, sir. Could I qualify that?

Q Yes, sir?

A He would do this because he is more concerned with immediate danger than he is a danger ten minutes from

now or tomorrow or next year; it's the immediate danger to himself that he is organized to escape from.

Q And any suggestion as to immediate help, he is willing—ready to take it?

A Yes, sir.

Q Regardless of future consequence?

A He would get out of the next one as it comes up, because right now in anxiety of the appearance—his perceptual field, it is narrow, like a horse with blinkers on, and he is only looking at what is right before him, and that is what he wants to get out of.

Q In your opinion, what would be his reaction if, at the time he was eighteen years old, he was caught up in a—in a situation of accused rape, community hostility, confinement in a jail, no contact with his friends or parents, what would be his mental reactions?

A I think, first of all, he is going to want to preserve his own being, his own life, and just as quickly as he can be assured of that, he is going to run.

Q If an opportunity is presented to him to—

A To preserve—

[fol. 32] Q —preserve his own life?

A To preserve his own life, where he, in a nonreflective way, sees a way out, he is going to run; that is first of all. If he's blocked from that, then he's going to run over whatever obstacle is in his way.

Q Does this make him particularly susceptible to coercion?

A I—I would think anybody who is this frightened is susceptible to coercion; yes.

* * * *

[fol. 34] MATT BOULDEN, witness for Petitioner, having been duly sworn, testified as follows:

DIRECT EXAMINATION:

BY MR. BRASWELL:

* * * *

[fol. 35] Q When—when—what time was it when you got the first word?

A Well, Mr. Robinson, they called him, he got the telegram, and he called me up, I had a telephone, and asked me about it, and I told him I didn't know. He said well, they called for Boulden and sent him, and so I told him, I said, "Wait a minute," I said, "I am coming over there in a few minutes," so I gets up and goes over there.

Q Now, what—about what time was this, did you say?

A About eight o'clock.

Q Uh, huh; and then what did you do when you went over?

A We got in his car, and me and him come to Decatur looking for the car.

Q Where did you find the car?

A We found the car at the jail; that is where we found the car.

Q Uh, huh; did you rec—did you recognize this as Billy's car?

A I recognized the car; I knowed the car.

Q Uh, huh.

A Well, we asked the jailer could we see Billy; he said, "No, we got him in safe keeping, you all can't see him."

Q This was about what time now?

A About eight thirty then.

Q Uh, huh; then you went on home?

[fol. 36] A Went back home.

Q Now, when is the next—what time did you receive the next word?

A Well, a Deputy, they came out there around about three o'clock that morning.

Q Now, that is the Sheriff's Deputies—

A Yes, sir.

Q —came to your house about three o'clock?

A That is what time about they come.

Q Uh, huh; and they told—what did they tell you?

A They told me what had—say what had happened.

Q Uh, huh.

A And they told me, said, "We stopped Billy Don on the highway and asked for driving license."

Q Now, when you went to Decatur to the jail and talked to the jailer there—

A He wouldn't talk with—he told us he had him in safe keeping, turned right on around and went back; that is all he would tell us.

Q Well, did you ask—did you tell—did the jailer know he was your son?

A He didn't ask me no questions; he wouldn't ask me no questions.

Q Did you tell him that you were—you were Billy's father?

A I told him, but he wouldn't listen to me.

* * * *

[fol. 49] BILLY DON FRANKLIN BOULDEN, Petitioner, having been duly sworn, testified as follows:

DIRECT EXAMINATION:

BY MR. MOORE:

* * * *

[fol. 51] Q * * * What was said; did either one of them say anything to you?

[fol. 52] A Well, Officer Goode, he got out; after he came back, I got out; he told me to put my hands on the car, and he shook me down and told me to take everything out of my pocket. And I took them out, and he went back to his car to make a phone call, and the Patrolman came to my car.

Q The Patrolman came to your car?

A Yes, sir.

Q Did he say anything to you?

A Yes, sir.

Q What did he say?

A Well, he told—first he came up there, asked me my name; I told him; then he told me to run because he had been wanting to kill him a nigger a long time, after he found out that the officer had said Mr. Hay's wallet was in my car and the gun.

Q All right; he told—at that time he told you to run, he had been wanting to kill him a nigger for a long time?

A Yes, sir.

Q Did you run?
A No, sir.
Q What did you do?
A I didn't do nothing; I just stood there.
Q All right. Did he have a weapon?
A Yes, sir; he had a carbine rifle.
Q All right. What did—what did he do with the rifle?
A Well, he pointed it at me.

* * * *

[fol. 55] A Well, Captain Williams asked me what had happened, and I started to tell him; he cussed me and told me it wasn't, and—

Q What did you start to tell him?

A Well, I started to tell him what had happened, and he told me I was—lied, and—

Q Well, what did you tell him; that is what I'm asking you?

A Well, I told Captain Williams I didn't do it, and he told me that I did. And after that, I said—start back telling him about the two guys that was there, and he told me I was lying again. And he got mad and start cussing.

[fol. 56] Q What did he say?

A Well, after that he told me that if I didn't confess—

Q What did he say when he got mad?

A Oh. Well, he called me a little bastard and few more names, told me I didn't have no business down there with that girl, and that was about it. Then he told me about if I didn't confess, that the officers that was wanting to kill me, he wasn't going to stop them.

Q All right. Were you handcuffed?

A No, sir; yes, sir; at the time in the car; yes, sir.

Q When you were sitting there with him?

A Yes, sir.

Q All right. And he called you some other names and used profanity toward you, you say?

A Yes, sir.

Q All right; you say you started to tell him about two other men, what—what—what did you tell him?

A Well, when he got in the car and asked me about what had happened, I started to tell him about that I

didn't kill Mr. Hays, there was two other guys that came in there, and about they was standing behind us when Mr. Hays was standing in the edge of the curve there.

Q Did you tell him that much?

A Yes, sir; then he stopped me and told me I was lying.

Q Then what did he tell you?

[fol. 57] A Well, he told me about if I didn't confess that the officers that was wanting to kill me, he wasn't going to stop them.

Q What did you tell him?

A Well, I told him if he would get me out of there and wouldn't let them bother me, I would confess.

Q Were there many officers down there by that time?

A Yes, sir.

Q You got any idea how many?

A Well, it was about twenty or more, I imagine—

Q All right.

A —what I saw.

Q When you told him you would confess, did you all leave the scene then?

A No, sir; he got out of the car, and the two officers got back in the car.

Q Did you have any conversation with them?

A Well, I didn't talk to them, but they was talking about me, though, in the car there.

Q What did they tell you?

A Well, the officer that was with Mr. Goode, he asked me how old I was, and I told him, and he told me I was old enough to die.

Q All right. That was before you ever left the scene?

A Yes, sir.

Q He told you you was old enough to die?

A Yes, sir.

* * * *

[fol. 61] A Yes, sir; went to the jail, and it was two or three officers standing at the door waiting on us when we got there; they took me upstairs to a cell, and they stripped me and put me in a pair of coveralls and put me in a cell.

Q All right; what did they take away from you?

A Well, they took my socks and shoes, shorts, short shirt, shorts, and pants.

Q In other words, they took everything you had; is that right?

A Yes, sir.

Q All right; and gave you a pair of coveralls?

A Yes, sir.

Q Give you any shoes?

A No, sir.

* * * * *

[fol. 71] Q All right. Did you show any of them this—this scar on your knee? Pull your breeches up.

A Captain Williams, he asked me about it; I told him I broke it playing football.

Q Come around here and stand.

A (Witness complied)

Q Is there a pin in this knee at this time?

A Yes, sir; right in there.

Q Can you feel the head of that pin?

A Yes, sir.

Q Is this it I am rubbing on right here?

[fol. 72] A Yes, sir.

Q Is that a steel pin down through the bone?

A Yes, sir.

MR. CLARK: Your honor, we have to object to this line of testimony, unless it can be shown that this pin in his leg had something to do with his confession.

THE COURT: Well, I will let him present his testimony on his general physical condition at that time, for whatever weight it may have on his ability to become overborne or to resist being overborne.

MR. CLARK: All right, sir.

THE COURT: It is admissible.

Q All right, you—where were you carried when you left the Athens Jail on Saturday morning, May 2, about three or four o'clock in the morning?

A Well, I was carried back to Decatur to the Toxicology, I think is what they call him, office.

Q All right. What happened down there, if anything?

A Well, they took—had me to strip off and took pictures of me.

Q Were there any markings or scratches on your body at all?
A No, sir.
Q Was there any blood on your body?
A No, sir.
Q Had you ever washed your hands that afternoon?
A Not until after we had fingerprints.

* * * *

[fol. 88] CROSS EXAMINATION:

BY MR. CLARK:

* * * *

[fol. 89] Q In the Flint Creek area. How many people were around that Flint Creek area at that time?
A Well, where we was at—
Q How many people were around?
A —I just couldn't say.
Q You couldn't say. Could you estimate?
A At the time that went on was just officers there.
Q That was on May 1; when the officers arrested you,
[fol. 90] he took you back to the creek bank, didn't he?
A Uh, huh.

* * * *

[fol. 91] Q They told you that. Now, you are saying now that two other men committed this murder?
A Not now; I told—as I said, I told Captain Williams at the beginning, and he told me that I told a lie about it.
Q But are you saying now that two other men committed this murder?
[fol. 92] A Yes.
Q Did they give you anything to eat that night?
A Yes, sir.
Q Isn't it true about eight or eight thirty they brought you in some hamburgers?
A Well, it was after we had got through with the confession and getting ready to go to the front—
Q Now—
A —I think—
Q —before the—
A —not for certain.

Q About eight thirty that night, did they give you anything to eat?

A No, sir.

Q They didn't give you anything, any hamburgers?

A No, sir.

Q How about cigarettes, did you have cigarettes.

A Well, Mr. Watts, he gave me half a pack of cigarettes.

Q They let you have water to drink, things of that nature, didn't they? Were you thirsty, you could have a drink of water?

A At the beginning, we couldn't get any water in the beginning, because it wasn't where the faucet was at to get water.

Q They let you go to the bath room when you wanted to; is that right?

A Well, after we got through with the confession, I went to the bath room.

[fol. 93] Q Now, when you were tried in Decatur, on cross examination—two ninety-two—didn't you admit this killing?

A Yes.

Q You did admit the killing?

A Yes.

Q You admit that you shot Loyd Hays on the stand?

A Yes.

Q You admit you cut Loyd Hays on the stand?

A Yes.

Q And that you shot him with two guns?

A Huh?

Q A twenty-two and a thirty-eight?

A Yes, sir.

Q You admitted that on the stand?

A Yes, sir.

Q Were you telling the truth then?

A No, sir.

Q You were facing a possible death sentence, and you told a lie on the stand; is that what you say?

A Yes—

* * * *

[fol. 95] Q And that morning isn't it a fact that Judge Bloodworth told you what you were charged with, that you were charged with murdering Loyd Hays, robbing Loyd Hays, and the rape case, also?

A I don't remember whether he told me all that or not, but I know he told me that—about the lawyer and all that stuff.

Q And he told you you could get the death penalty for any one of those three crimes; isn't that correct?

A Well, I don't remember.

* * * *

[fol. 100] Q You ever had any head trouble?

A Yes.

Q When?

A Well, I have had head—fainting spells, I guess you would call it, ever since I was a little bitty boy.

Q Did you have any—any headache or head trouble that night in the jail in Athens?

A Yes, sir.

Q When?

A Well, I had head—my head had been hurting for about—I don't know, right after—see, it was about three or four months it had been hurting, on and off, but the night before in Athens over there it started worse, and I asked for some aspirin, but I couldn't get any.

* * * *

JAMES N. BLOODWORTH, witness for Respondent, having been duly sworn, testified as follows:

DIRECT EXAMINATION:

[fol. 101] BY MR. CLARK:

* * * *

[fol. 102] Q Where did you send him?

A I sent him to Limestone County, which is one of the two counties in our Circuit, is now, and some fifteen miles away, and had him placed there that evening under the custody of the Sheriff of that County.

Q Did you make a written order on that?

A Yes, sir; I made three orders, one order sending him to Athens, one transferring him from Athens back to Decatur, which is where this particular court was sitting—

Q Yes, sir.

A —the next morning, and another order the next morning sending him to Kilby for safe keeping.

Q Now, directing your attention to the hearing on May 2; would you tell the court about that? What happened at that hearing?

A Well, the then Solicitor, now District Attorney, Hundley had conferred with me on the phone that night about the matter. I had called him about this matter of transferring the prisoner, and he and I talked about advising this man of his rights, and I determined to have a hearing at six a.m. so that I might advise him of his constitutional rights, what I considered to be his constitutional rights, and I might say I stayed up most of the night deciding what I would advise him about.

* * * *

[fol. 104] A I advised him generally of his constitutional rights, as I recall it, but the record will bear me [fol. 105] out, his right to a jury trial and that he didn't have to make any statement that would tend to incriminate him, I think I used that word, but I say; "There is anything that would tend to connect you with the crime, and if you do it may be used against you," and also that he was presumed innocent until he was proven guilty, that he would have to be indicted by a Grand Jury before he could even be tried, that he had three avenues open to him for bail, if I recall aright, habeas corpus, a petition for bail, and a preliminary, and I explained briefly what—in what they consisted, and, if I recall, in the record, periodically I asked him—I stopped and asked him if he understood that. And—and—and I recall—I have reread the record, I might add, to refresh myself on it—at one point I remember he said, "Not so far," which indicated to me that he understood what I was saying to him, though—though I am sure that is a surmise on my part.

Q Did he appear nervous that morning?

A No, sir; to the contrary.

Q Did he appear like he had had no sleep that night?

A No, sir; I believe I asked him the questions—again, the record, I suppose, is more accurate than my memory, or even my memory of the record—but if I recall—

MR. MOORE: Would the Judge like a copy of the record?

WITNESS: I have one here, sir, if I might refer to that.

[fol. 106] MR. MOORE: Certainly, so far as I am concerned.

A I believe I asked him if he had been denied food and water; I believe I asked him if he had been denied bath room privileges, to go to the bath room, and whether they had given him everything that he requested in the way of food and water, something to that effect, and he said they had; and I asked him, I believe, if they have threatened him or beaten him or mistreated him or physically hurt him in any way, and he said they had not; he didn't show any marks of anything at all that I could see.

Q Did he appear to be intimidated or under duress at that time, this petitioner?

A No, sir.

Q And he answered your questions readily?

A Yes, sir.

MR. CLARK: I believe that's all the questions.

* * * * *

[fol. 114] CROSS EXAMINATION:

BY MR. MOORE:

Q And at no time did you ever ask him whether or not he was impecunious; is this correct? This is on the hearing of May 2 I am talking about?

A Yes, sir; it does not appear in the record, or I am not sure whether it does, but I gathered the impression that the family wanted an opportunity to see if they could employ counsel. Now, I do not know whether that is in the record or not, but I did not ask him. Of course, this was prior to the Escobedo decision and other decisions, and I just didn't ask him if he wanted a lawyer appointed.

Q I understand that is—
A But I did not—
Q You didn't ask him whether or not he was impecunious or whether or not he could afford counsel or whether or not he wanted one appointed, and you did not offer to appoint one at that time, did you?
A No, sir.
Q Now, who—who held the hearing at the—when he was finally indicted; did you do it or—
A No, sir; I did not. This was my entire—
[fol. 115] Q You didn't appoint—
A —experience with the case.

* * * * *

[fol. 125] JOHN H. WILLIAMS, witness for Respondent, having been duly sworn, testified as follows:

DIRECT EXAMINATION:

BY MR. CLARK:

* * * *

[fol. 129] Q Did you have any conversations with Boulden?
A Yes, sir.
Q What was said, if anything?
A Well, as best as I can remember—
MR. MOORE: If it please the court, may we ask to tie this down as to a specific time now?
MR. CLARK: May 1 of 1964.
THE COURT: When they were in the car together?
MR. CLARK: In the car together.
A My best recollection, he said something to the effect that, "I didn't do it," or something like that. And he was —I don't remember in detail, he was telling me what—how he found him or something to that effect, and so then while he was doing that the girl came up, and they told me that she wanted to see him, so that is when I got him out. And after she said it was him, I put him back in the car. Well, then I did step back out and ask the officers what she said, and they said that she said that he

was the one that shot Mr. Hays and the one that raped her, so I got back in the car, and I told him, I said, "The girl there says—says you are the one that shot Hays, said she saw you." And he said, "Well, I done it," or something like that. We didn't go in details; we didn't ask [fol. 130] him any details about it, and he didn't tell me any details about it.

Q What happened after that, if you know?

A When Lieutenant Watts came up, I got out and talked with him and told him the defendant had told me that he done it, and then I had to go, I got a call on the radio to go call my Colonel here in Montgomery and advise him what had happened, and so I go to the phone, and while I am gone to the phone they proceed to leave there with him and take him to Athens, Alabama. And so I go on to Athens, and the next time I see him is in the jail over at Athens that night.

Q What time was that in Athens you saw him?

A In the afternoon?

Q Yes; in Athens, Alabama?

A Oh, in Athens; my best judgment, I would say it was about seven thirty or eight o'clock that night.

Q Did you question this defendant at that time?

A Yes, sir; I questioned him again over there in Athens.

Q Who was present when you questioned him?

A Part of the time Lieutenant Watts and myself, and part of the time Lieutenant Watts and myself and Sheriff McRae.

Q Did you or any of the other officers advise him he did not have to make a statement?

A Yes, sir.

Q You did. Did he make a statement?

A He did.

[fol. 131] Q That was reduced to writing?

A Lieutenant Watts reduced it to writing; yes, sir.

Q Now, this statement was not offered in evidence at the trial, was it?

A My best judgment, it wasn't.

Q And you didn't testify as to the other admission in Decatur?

A No, sir.
Q Where he said, "I did it"?
A No, sir; I didn't testify to that.
Q How long did the interrogation last, do you recall?
A In Athens?
Q In Athens; yes, sir?
A I would say in my best judgment the interrogation, then reducing it to writing, the time that Lieutenant Watts was writing, about an hour and a half.
Q While over there at Athens, was he fed?
A Yes, sir; we sent out and got him some hamburgers.
Q About what time of night was that?
A That was just before we started talking to him; I would say about eight, eight thirty.
Q Was he given cigarettes?
A Yes, sir.
Q Permitted to go to the bath room?
A Yes, sir.
Q Given water to drink if he wanted it?
A Yes, sir.

[fol. 132] Q Now, that night, was he—when was he turned back to his cell in Athens; when was he put in the cell for the night? If you know?
A About midnight, in my best judgment, or just—he didn't—he didn't remain there; he was just put back in there after we were through talking to him until we brought him on back to Decatur that night.

* * * * *

[fol. 139] Q Tell him to shut up or anything?
A No, sir.
Q You didn't cuss him in any way?
A No, sir.

* * * *

CROSS EXAMINATION:

BY MR. MOORE:

* * * *

[fol. 145] Q I see. All right, sir; had they taken the prisoner's clothes when you got up there?

A Yes, sir; he was in county—county clothing.

[fol. 146] Q Was that a suit of fatigues or—

A That was a suit of coveralls.

Q Coveralls?

A Herringbone coveralls.

Q All right; barefooted, I believe, wasn't he?

A I don't recall whether he was barefooted or not.

* * * *

[fol. 151] A In my best judgment, the first thing I said to him in Athens was told him about his rights.

Q All right; would you tell us in detail exactly what you said as you remember it?

A I told him that he didn't have to make a statement to us, that anything he said could be used against him, [fol. 152] and probably would be used against him, and that he had a right to a lawyer.

Q All right. Did he tell you he wanted a lawyer?

A I told him, I said, "We haven't offered you any reward or forced you or threatened you in any way to get you to make a statement, have we?" He said, "No."

Q Did you put that in the statement?

A I don't know if Lieutenant Watts put that in his heading or not; I always did when I was Investigator.

Q That is a routine matter you spieled off before you start the interrogation, isn't it?

A No, sir; we don't spiel it off.

Q All right.

A We explain it to them.

Q All right. Did he tell you he wanted a lawyer?

A No, sir.

Q Did he tell you he wanted to talk to one?

A No, sir.

Q Did you tell him he would have a right to have one there if he wanted one there?

A Told him he had a right to a lawyer; yes, sir.

Q Did you tell him when?

A Yes, sir; told him he had a right to a lawyer.

* * * *

[fol. 165] REDIRECT EXAMINATION:

BY MR. CLARK:

Q Captain Williams, I believe you stated earlier that you advised the defendant he didn't have to make a statement and that he was entitled to a lawyer; is that correct?

A I did.

Q On May 1?

A Yes, sir.

Q Now, how about on May 6, did anyone in your presence advise him he didn't have to make a statement before he made all the statement in the woods?

A I don't recall anybody advising him of that.

Q Now, isn't it a fact he was—Boulden was brought back to Decatur for arraignment on or about May 6?

A Yes, sir.

Q He was arraigned on May 7, was he not?

A Yes, sir.

* * * *

[fol. 178] E. B. WATTS, witness for Respondent, having been duly sworn, testified as follows:

DIRECT EXAMINATION:

BY MR. HUNDLEY:

* * * *

[fol. 194] Q * * * On any occasion that you were present with this defendant, either at a time he was being interrogated or questioned or prior thereto, did you or anyone that you ever saw intimidate him or point guns at him, tell him they were going to shoot him if he ran?

MR. MOORE: We object to this question, your honor.

THE COURT: I will permit it.

[fol. 195] MR. HUNDLEY: Well, I—all right.

A No, sir.

MR. HUNDLEY: Your witness.

THE COURT: Cross.

CROSS EXAMINATION:

BY MR. MOORE:

Q Lieutenant Watts, how long have you been a State Investigator?

A A State Investigator almost six years.

Q What was your police experience and background that you got this job?

A Well, I was a Highway Patrolman, but prior to that my total experience to date is a little over twenty years.

Q What sort of special training have you had to make you an investigator?

A To make me an investigator?

Q Yes, sir?

A None; an examination.

Q You took an examination from the Highway Patrol at that time?

A Yes, sir.

Q For an investigator?

A Yes, sir.

Q How many are there in the State?

A Right now I believe there is thirty or thirty-one.

Q And who do you answer to?

A I answer directly to Captain R. W. Godwin and/or [fol. 196] Major W. R. Jones.

Q Are you under Captain Williams up there, or do you answer directly to Montgomery?

A I answer directly to Montgomery.

* * * *

[fol. 197] Q Captain Williams has testified that at first the prisoner told him he did not commit this crime; did Captain Williams ever tell you that?

A Yes, sir; he told me that he first told him that; yes.

* * * *

[fol. 199] MR. MOORE: * * *

Q Now, I don't quite understand what transpired at Athens in my mind; I have been reading your report here, and it said that you first went up to interrogate this

prisoner about eleven o'clock at night, and awhile ago you said ten; do you have an independent recollection about when you and Captain Williams went to the Limestone Jail to interrogate the prisoner?

A Yes, sir; I think it was near eleven o'clock.

Q All right; all right, sir. And then the statement is—you start off at eleven fifty, and then it shows it is [fol. 200] signed at one thirty. Now, are those times accurate in your best judgment and recollection?

A I really didn't think it was one thirty; it may have been.

Q Well, it is—look at the bottom of the statement?

A If I have it in my report, it is correct; that is right; yes, sir.

Q That means that is when the statement was signed, about one thirty in the morning?

A That—that is about right; yes, sir.

Q All right; and you started taking it at eleven fifty; is that correct?

A That is correct.

Q All right. Now, I don't understand what transpired between eleven and eleven fifty; is that when you were fooling with this tape recorder?

A What transpired between eleven and eleven fifty was getting acquainted with the defendant, informing him of his—some of his rights and talking to him in general about this crime.

Q All right; and then you wrote down—this is your handwriting on this statement, isn't it?

A Yes, sir.

Q Let's see, "Wish to make the following voluntary statement to E. B. Watts. I have not been threatened in no way, offered no reward nor hope of reward to get me to make a statement. I have been told by Mr. Watts that any statement I make can be used against me in a court of law"; whose language is that?

[fol. 201] A It is my language.

Q Is that a form statement that you put on the top of every statement you take?

A No, sir; I vary that; it is generally the same.

Q That is your language, and you dictated that to yourself, so to speak, or you wrote it like you wanted it written?

A No, sir; I wrote it as though I told him, and I did tell him, I—and then I wrote that down, and I read that part back to him before I started asking him any more questions here; this had already been told to him.

Q All right; but—.

A Maybe not in those exact words, but generally the same thing.

Q But this is what you told him right here?

A Yes, sir.

Q All right. All right. But nowhere on there did you tell him in this statement that you wrote down that he didn't have to make a statement, did you? It doesn't appear on here, does it?

A I don't guess it does, but I usually do say that, also.

Q All right; neither did you tell him he had a right to have a lawyer, did you?

A I don't recall on that point; I don't think I did.

Q All right. Did he tell you he wanted one; do you remember that?

A No; no, sir; he didn't say anything about wanting a lawyer.

Q Did he ask if he was supposed to have one?

A No, sir.

* * * *

[fol. 226] (Witness E. B. Watts returned to stand)

RECROSS EXAMINATION:

BY MR. MOORE:

* * * *

[fol. 231] Q Is this a true and correct copy of what you originally took on the wire recorder?

A That—it is; yes, sir.

Q It is a full—full tape of what was on that wire recorder, is it not?

A It is; it is; yes, sir.

Q All right; sir. Now, in that—when that tape was made, there are two voices on there; is one of those your —there are three voices; is one of them your voice, one of them Captain Williams' voice, and one of them the prisoner's voice?

A That is correct.

Q All right, sir. The tape opened with a grinding and a closing sound; did you turn your machine on as you went into the jail cell?

[fol. 232] A Yes, sir; or the room that—

Q Where the interrogation took place?

A Right; yes, sir.

Q And this sound we hear is when you first went in the door and the door closing behind you, is it not?

A That is correct.

Q All right. Now, had you talked to this prisoner at all prior to that time?

A No, sir.

Q So every—all your conversation with the prisoner from this point forward on this evening up to the time the tape ran out is on this tape, is it not?

A That is correct; yes, sir.

Q And this took place in the—around ten or eleven o'clock at night, did it not?

A I believe I testified yesterday around ten; I—I stand corrected, I think it was nearer eleven o'clock.

Q All right. All right. Then after this time, after you took this tape, then around eleven fifty, between there and one thirty in the morning, then you made a written statement, prepared a written statement, which is marked Petitioner's Exhibit number 2, did you not?

A I did.

Q This came after the tape?

A That is correct.

[fol. 233] Q As I understand it, you had no conversation with this petitioner, this prisoner, did not warn him of any rights or had no conversation at all with him prior to the starting of this tape?

A That is correct.

* * * *

5-1-64 11:50 P.M.

STATEMENT OF BILLY DON FRANKLIN-BOULDEN Page 1.

I Billy Don Franklin Boulden on D.O.B. 8-3-45 address Falkville 2, Ala. Wish to make the following Voluntary statement to E.B. Watts I have not been threatened in no way offered no reward nor hope of reward to get me to make a statement. I have been told by mr. Watts that any statement I make can be used against me in a court of law.

Billy Don Franklin Boulden

This afternoon about 3:30 or 4: oclock. I was fishing on Flint Creek between Decatur and Hartselle. I was near the Kays station on highway 31. I had parked my car at the bridge + went up the creek a few yards and was fishing. I saw a white girl walking across the bridge. She was walking west. She was chunking rocks or something in the creek.

I spoke to her and talked to her

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page 2

a few words.
I had seen her in Hartselle on the streets before. I called her and she stopped and started talking to me.
I asked her if she wanted to go for a ride. She said where bouts. I told her up the next little old road that I knew where a nice spot was. She said I guess so.
I laid my fishing pole down, backed my car into the road + went over and picked her up. She got in and laid down.
I passed an old yellow looking Chevrolet parked on the road with some kids in it. Right after I passed it I turned right into the woods. I drove a little ways, parked the car and we got out. I strapped my pistol I had in the car on my side and we walked on down the road to the bank of the Creek.

Billy Don T. Bowlin

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I began feeling around on her for a few minutes and asked her if she was ready. She said OK. She pulled her britches off and laid down. I got on her and had intercourse. First I put a rubber on. After we got through she put her britches or shorts back on. We sat around and talked a few minutes.

I asked her if she wanted some more. She said she didn't mind. She pulled her britches back off and we did it again. I also used a rubber this time.

We left and was walking back toward the car when we met some kind of police officer in green cap & pants and brown shirt. He also had on a gun. He asked what we was doing down there and I told him we had been fishin. He placed his hands on his hips

Willie Wm. T. Bowden

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and said you'all come on and go with me. about this time she ran around behind or beside him. I had my pistal in my packet then so I jerked it out and shot him in the stomic or chest. I tried to shoot him in the shalder to keep him from getting his gun. my gun was a little automatic pistal. after I shot him I jerked his gun and holster off him. He grabbed me and we started scuffling. I believe I shot him some more I don't know how many times. my gun held six shells. It either emptied it or it snapped. I don't remember for sure whether I shot him with his gun or not. He never did shoot it, because I grabbed it.

Billy Brent Bonifield

When he kept scuffling with me I got my knife out and started cutting him. I don't know where all I cut him, done on the

shoulder and some on the head and neck. He fell down close to a tree.

By this time the girl had run off & I took his pistol and went to my car. His car was sitting behind my car, locked up, so I backed into it and pushed it out of the road with my car. I backed past a little side road turned into it and came back to the main dirt road and got almost to the bridge where I picked the girl up.

I decided to go back down there and see about him. I got his billfold and went back and got in my car and had started out again when I met the officers car. I had his pistol lying on the seat beside me, so I just slid it under the seat then one of the officers said let me see your packet book or drivers license or something. I handed

William T. Vaughn

him a billfold. he looked in it and said he had stopped me once before for something + this is mr. Hays billfold. we went back down to where the man was.

after a while Captain Williams got ther and I told him how it happened to the best I knowed how.

I have read the above 5+1/2 page handwritten statement and it is true to the best of my memory.

x Billy Dan T. Boulton

May 2, 1964

1:30 P.M.

Witnessed - John H. Williams

" Knox McRae

E B Watts

EXHIBIT A--Transcription of wire recording confession taken in the Limestone County Jail on May 1, 1964, commencing at about 10:30 P.M.

Capt. Williams:

Q: How you doing Billy—set down right here? How do you feel Billy?
A: Pretty good
Q: Huh
A: Pretty good
Q: Now talk up so we can hear you good and uh
A: Yessuh
Q: Nobody has threatened you or anything, we haven't offered you anything to get you to talk to us? You know—you remember me, Cpt. John Williams, Highway Patrol, that talked to you today out there today in my car, you remember me?
A: Yassuh
Q: Now this is Lt. Watts, E. B. Watts, He is a State Investigator for the State of Alabama. In other words he works for our same department but he is in plain clothes where I wear a uniform. You understand who he is?
A: Yassir, I understand
Q: Your full name is—what?
A: Billy Don Franklin Boulden
Q: What does the F stand for?
A: Billy Don Franklin Boulden
Q: Billy Don Franklin Boulden?
A: Yessir
Q: Billy now you understand what we doing, we just want to talk to you, want you to tell us the truth about everything that happened today. Now you know you talked with me today in the car and I just want you to repeat it all for Lt. Watts here, just tell us the truth about what happened today.
A: Well—
Q: Now talk up where he can hear you cause he don't hear too good so talk up so he can hear you.
A: I understand, talk so he can understand

Q: That right—
A: Well I was standing in the woods down there and started back out and

Lt. Watts

Q: Where is this Billy?
A: That is down there in front of the Kayo Station
Q: You was down there in the woods down there in front of the Kayo Station?
A: Yessir
Q: Is that close to Flint Creek?
Q: That's in Morgan County ain't it?
A: Yessir
Q: All right
A: And I was going to start up when the gal was coming along down the road down there, walking down the road
Q: Who was?
A: She, uh
Q: Just start back at the first—you was down there uh close to Flint Creek in front of the Kayo Station—did I hear you right?
A: Yessir
Q: uh about what time of day was this Billy?
A: About 3:00 o'clock—about 4:00 o'clock somewhere about 3 or 4 o'clock
Q: All right 3:30 or 4:00 o'clock? Now what was the first person you saw or and so forth down there?
A: Well the first person
Q: Just the truth that's all we want, just uh your uh version or what happened.
Well—(cough)—excuse me—(inaudible)
A: Well—the first person I saw down there
Q: Now I understand you have already talked with Capt. Williams and already told him the story of this thing so if you don't mind just repeating it—just or tell Lt. Watts what happened?
A: Well, erah, the first person I saw was the girl from Hartsell over there, I saw her down there a few times
Q: A girl out of Hartsell?

A: Yes suh
Q: You know who it was?
A: I did not know her particular, but—I saw her a few times and uh, saw her and I talked to her
Q: You saw her this evening?
A: Yessuh
Q: Where at—down there in the woods?
A: Yessir—and uh
Q: Where was she at when you first saw her?
A: Well I started out of the woods first and she was coming down the road, she said her sister and them had had a flat or something
Q: Had a flat or something?
A: Something like that, and uh, I talked to her and stuff like that so we went on back up to the woods and when uh we started out
Q: Wait a minute when you were down in the woods did yall do anything?
A: Suh
Q: While you and her were down in the woods did yall do anything?
A: Yessuh
Q: What did you do?
A: Played around down there for a little while and then went on back
Q: Well now wait a minute, what you mean played around—just tell us out in plain words the way it was?
Capt. Watts: We are all men
Q: What did you do to her if anything?
A: Well after we went on down in the woods and I messed with her and done took her and started back out that's all
Q: Done took her?
A: Suh
Q: Say you done took her?
A: I said after we started in the woods
Q: Well what did you do to her while you was messing with her?
A: Suh

Q: What did you do to her when you were messing with her?
A: Oh, you mean when we was down in the woods?
Q: That's right.
A: We started out and messed around
Q: You said you messed around—did you fuck her?
A: Yes sir
Q: How many times
A: Couple of times
Q: Couple of times
A: Yes
Q: Well did you uh, just tell me about while you was doing it to her. How did you do it? Was you standing up, laying down or what?
A: Laying down mostly
Q: Laying down—Did you use anything on yourself?
A: Yes sir, I used some protection
Q: Used some protection, you mean a rubber
A: Yes sir
Q: How many rubbers did you use?
A: Couple of them
Q: A couple of them?
A: Yes suh
Q: All right when you got through then—Well just go on from that and tell us what happened Bill, don't make us have to ask you so many questions, just tell us the story
Q: Did you have one or two intercourses with her
A: Suh
Q: Did you have sexual relations with her once or twice or three times or
A: I reckon I had intercourse with her first
Q: How many times did you screw her?
A: Oh, that was the first time. We sat around and talked—I had saw her around and spoke to her
Q: Yeh, what about—you used two rubbers you said—did you get through twice
A: Oh—
Q: How come you to use two rubbers?
A: We took

Q: So you did it one time and then sat there awhile and did it again, did I understand you right
A: Yes suh
Q: All right—after you got through with her then—you got through doing it, yall started back out of the woods—what happened then.
A: Well we started back out of the woods, we look and Mr. Hays Was
Q: Mr. Hays?
A: Yes sir
Q: Did you know him?
A: No sir, I did not know him very well
Q: Well how did you come up with the name Hays
A: Well I heard the officer—
Q: When you went up and looked at him you heard them call him Mr. Hays?
A: Yes sir
Q: All right—when you saw Mr. Hays what did you do?
A: Well he speak at me then he started asking me a lot of questions
Q: What kind of questions did he ask?
A: He asked what I was doing back up there and a whole lot
Q: Did he have on a uniform or anything?
A: Yes
Q: So you recognized him as being some kind of officer
A: Yes sir
Q: Uhuh—say he asked yall a lot of question about what you doing back there and everything
A: Yes sir
Q: And what did you tell him then?
A: I told him I was checking fishing rods and everything, he just stood there and looked and put his hands on his hip, something like that
Q: Just stood looked and put his hand on his hips?
A: Yes sir, something like that
Q: All right, then what happened?
A: Well I don't know, she got scared or something
Q: She got scared or something
A: Yessir
Q: What did she do

A: She run up behind him.
Q: She run behind him?
A: Yes sir
Q: Then whan happened?
A: I don't know, I'm confused that parts of it
Q: Well tell me best you remember what happened, just imagine now that you are back down there and he talked to you there and you told him that you had fish down there, etc., just go ahead—what was the next step that you remember, or done, if anything?
A: After I told him that—he was kind of (pause) anyway she took and I reckon she good scared or something, she ran behind him and hollered and said something, he took and reched for his gun and I jerked it. Last night seem almost blank again.
Q: Well you remembered it this afternoon when you was talking to Cpt. Williams down there didn't you
A: Yeh, I told the captain what I—

Capt. Williams

Q: Well I want you to tell Lt. Watts in your own words what happened.
Q: We want to know anything else except the truth
A: Well that's about all
Q: Well, now you just got up to the part where she got excited and jumped behind Mr. Hays—all right—then what did you do?
A: Well when he took and uh, I taken his gun and shot him
Q: You jerked his gun and shot him?
A: Yes sir
Q: With his gun or with what gun?
A: Yes sir
Q: What gun did you shoot him with?
A: Oh, shot with mine first
Q: Did you have a gun?
A: Yes sir
Q: What kind of gun was it
A: A 25
Q: A 25?
A: Yes sir
Q: Did you shoot him with it

A: Yes sir
Q: Well did you shoot him with his gun after you jerked his gun?
A: I—I don't know whether I shot him with his gun or not?
Q: Well how many times—how many shells does your gun hold?
A: Seven, shoot seven in it
Q: Seven? What calibre is it?
A: Little ole automatic type
Q: Did you say it is a 25?
A: Yes sir
Q: Calibre, automatic—how many times—did you shoot yours empty?
A: I don't know for as I can tell—he took and grabbed me—I dropped it
Q: Did he grab you after you shot him?
A: He grabbed me after I shot him, I took and—I thought
Q: Did yall scuffle around any—you say he grabbed you?
A: Scuffed around down there—he grabbed me and he fell—that's where he stopped at.
Q: How many times, just in your estimate, had you shot him; had you his gun then?
A: Sir
Q: Did you have his gun by that time, when he fell?
A: All I know he started toward me
Q: You shot him you think with your gun first and then you got his gun?
A: I don't know—I don't know whether I shot with his gun—I know I think I shot with mine and he grabbed me and I cut him I think
Q: Then you cut him you say?
A: Yes sir, I think, something like that
Q: That when he fell?
A: Yes sir he fell
Q: Where did you cut him?
A: I don't know—I was hitting at his shoulder
Q: Well did you shot his gun any
A: Suh
Q: Did you shoot his gun any?

A: I don't know, I might have, I don't know—
Q: You were't drinking or nothing was you
A: No sir—I don't fool with it
Q: You don't fool with it
A: No, sir
Q: You don't take any kind of pills or dope or anything do you.
A: No more than BC
Q: No more than BC—well now when you and him was scuffling and you was shooting and cutting him—what happened to the girl?
A: When I told her to run and she she run (can't hear) took and carried her home when I got to the car she had gone and I got in the car and started out. I got out to and turned around and came back
Q: Did you get out of theer before you turned around and come back?
A: Yes sir, I got out in the road almost to the bridge.
Q: How did you get past his car down there where he left it—didn't he have your car blocked in?
A: Yes sir
Q: How did you get around his car?
A: I took and I backed mine and I push his back out of the way.
Q: Back out of the way?
A: Yes sir
Q: Why didn't you drive his back out of the way?
A: I looked at it but the doors or something was locked
Q: The doors was locked and you couldn't get in?
A: Yes sir
Q: Then you took your car and pushed his back out of the way
A: Yes
Q: You got around him then in your car
A: Yes sir—well I pushed it back and came out this way—
Q: You pushed it back out to that little side road probably had to turn around on the little road further out
A: Yes sir
Q: Then, did I understand you to say that you got nearly out to the road then you turned around then and come back to where he was laying.

A: Yes sir, after I got out of there, almost to the bridge I turned around and went back, I turned around and came back and came back down there to the woods —so I got his pocket book and started out again and that's when I run into that other

Q: Ran into an officer—in other words you say you got out to the road and then you went back in there to him and that's when you got his billfold?

A: Yes sir

Q: And they what did you do with the billfold

A: I stuck it in my pocket

Q: Stuck it in your pocket and then you started out again and when you got out nearly to the road that's when you met these officers that stopped you

A: Yes sir

Q: Well what did they do when they stopped you?

A: Well this young one after we had stopped, I took and —I pulled up and stopped and this old guy he came around there and told me to get out. I got out and he searched me—after he searched me he turned and told that other one and that uh to call and tell them something about that they had a suspect—tell them

Q: Tell them that he had a suspect?

A: Something like that

Q: Well did he find anything on you when he searched

A: No more than the pocket book and the gun

Q: Did he find Mr. Hays pocketbook in your pocket

A: Yes

Q: Where did he find Mr. Hays gun

A: It was in my car

Q: In your car—qhere bouts in your car?

A: Under the seat

Q: Under the Seat?

A: Yes sir

Q: Did—back there where the shooting took place—what happened to your little pistol

A: I don't know—I took it and after it was, happening awful fast, I think I throwed it, I don't know

Q: you think you throwed it?

A: Yes

Q: Now this is important and if you stop and think about it you can clear it up I believe. Do you remember whether you shot him or not with his own gun any.
A: I don't know
Q: Did he ever get his gun out hisself—in his hand?
A: I don't think so.
Q: When you jerked his gun off him, you got gun, holster and all didn't you.. The gun was still in the holster and holster and all came off of him in the same jerk didn't you?
A: I think I did—yes sir
Q: You remember shooting—you know how bad your gun kicks, while it is a small gun it doesn't kick much does it.? You remember shooting a gun that jarred your hand any more than, uh, your little 25?
A: I don't think so, I don't know (whine) I don't think so
Q: You think, you think you remember shooting his gun, shooting him with his gun.
A: I don't know, I don't know (whine)
Q: Well I imagine you was excited after it all started and you are not positive whether you shot him with his gun or not but you do know that you shot him with your gun?
A: I think so
Q: Well did he stagger or anything or did he grab aholt of you or just what happened then after you shot him the first timr
A: Sir
Q: Just what happened after you shot him the first time, if you can remember?
A: The first time?
Q: Yes, yall had a little argument and he asked you what you was doing down there and so on, if I understand the fact and uh
A: He asked what you doing down there and he said you all come and go with me. I don't—I don't know
Q: He said you come on and go with me?
Q: Then I don't know (whine)

Q: Then she run around behind him then and you just jerked your little old gun—say you had it in your pocket or did you say
A: Yessir, I think it was in my pocket—I don't know
Q: and you just jerked it out and shot him? and did you shoot at her?
A: No sir
Q: What happened to her then?
A: Well she disappeared—I thought gone up to the car —when I came out the car was gone. I went to ..... and turned around.
Q: The car was gone—did I understand you to say the car was gone?
A: Yes, I didn't see it, I didn't notice it around.
Q: Where did you leave the car parked? Your car I am talking about?
A: My car was parked on the other side of where she was at.
Q: Oh, you mean the car that you had first seen—did you see her in
A: Yessir took—with her sister believe she said
Q: With her sister?
A: Ithink it was her sister
Q: Did you see her sister
A: Sir
Q: Did you see her sister
A: I saw some kids in the car—when I came by there
Q: Where was she then? Where did you pick her up anyway?
A: When we came out of the woods down there and
Q: Was she walking or in the car?
A: She took and uh—after I got to talking to her. I asked her if she was doing OK
Q: Asked her?
A; Yessir
Q: Asked her what
A: Well I just talked along
Q: Did you show her your pistol then
A: No sir, not then—it was still in the car until after we got out of the car—after we got out we went off in the woods

Q: And you went on down there and had intercourse with her a couple of times and then yall was on the way back to the car when you met this fellow. Now am I straight on that
A: Yes, sir
Q: Well now when you was—do you understand what having intercourse is?
A: Sir
Q: Do you understand what having intercourse is?
A: Relations
Q: That's right, it means you was fucking
A: Yes sir
Q: When you was having intercourse with her did she fight you or anything like that?
A: No sir
Q: Did you take her clothes off
A: No mostly she took them off—laid down on her britches
Q: She laid down her britches? She laid down on them?
A: Yes sir
Q: Did she take them off
A: Yes sir
Q: Did she take them off
A: Yes sir
Q: She took her britches off—she had on—what did she have on
A: She had on a pair of shorts or
Q: A pair of shorts
A: Something britches
Q: Did she have on any panties
A: Yes sir
Q: Did she take them off?
A: Yes sir
Q: And did she take her top blouse off
A: No sir, she didn't take that off
Q: Did you take your pants off
A: I pulled them down
Q: Pulled them down but you did not take them plumb off?
A: No sir

Q: Did you pull your shorts or underwear down?
A: Yes sir
Q: Now after yall had the first intercourse you say you sat around and talked awhile—did she put her britches back on while yall were sitting there, after you got through the first time
A: Yeh, she put her britches on, sit there and talked—and talked awhile and then messed around again and I asked her if she wanted any more.
Q: You asked her if she was going to give you some more What did she say?
A: She kind of laughed and she started unbuttoning
Q: Did she say anything about the other woman up there in the car, her sister you thought, it was, knowing where she was at or anything
A: Said she was supposed to been gone to a service station
Q: Said she was supposed to have been gone to a service station
A: Yes sir'
Q: Didn't yall pass by there in the car?
A: We didn't make it back to the car.
Q: I mean when you picked her up. You picked her up, I understood you to say or did I understand you to say awhile ago, downthere close to the bridge someplace
A: Yes sir
Q: Now, uh, was the car that she was driving, had the flat on it, what kind of car was that?
A: It was an old model Chevrolet.
Q: Old model Chevrolet, what color, do you remember?
A: Yellow
Q: Yellow—where was it, was it between where you picked her up and the road that turning on in to the woods
A: Yes sir
Q: Well now when yall passed that car, when you went into the woods—you had to pass it—did you see her sister or who did you see if anybody in the car?
A: There was some kids, I thought they was her

Q: Saw some kids in it?
A: Yes sir
Q: Now where was this girl you carried into the woods, where was she at in your car at that time?
A: On the front seat?
Q: On the front seat?
A: Laying down
Q: She laid down
A: Yes sir
Q: Did you ask her to lay down?
A: I knowed that was another car around there, I didn't know it was hers. Then she lay down
Q: Well did she say why she laid down?
A: No sir, I didn't ask her not right then
Q: When did she tell you her sister that was waiting on her she had to go to the service station to see about a flat?
A: Well, it was after we set up and talked for awhile she said she had to go to the service station or something and see about getting somebody to fix a flat or something.
Q: Did she say she had been to the service station?
A: I don't think so
Q: Which way was she walking when you picked her up?
A: Well she was, when I picked her up she—fishing line
Q: I was just fixing to ask what was you doing down there in that road—say you had been fishing?
A: Yessir
Q: Where was you parked?
A: Right there below the bridge
Q: Right there at the bridge?
A: Yes sir
Q: On which side the side next to the highway or the other side?
A: Right next to the highway
Q: And you saw her pass as she went by—where did you first see her when she was coming from the filling station?
A: I started out of the woods—I stayed and talked to her and then I laid my fishing poles down on the side of the road bed there

Q: Are they still out there as far as you know?
A: Yes sir, I guess so
Q: On the side of the road there by the bridge?
A: Yes sir
Q: Where were you fishing down under the bridge?
A: No sir, I was down in the woods.
Q: How far from the bridge approximately?
A: I don't know—about half the distance from the bridge to the other road
Q: Were you up the creek or down the creek from the bridge?
A: Sir
Q: Were you up the creek or down the creek from the bridge?
A: I was down the creek.
Q: Down the creek toward the highway?
A: No sir, down from the bridge across from a little road there
Q: You were in the direction behind your car in other words?
A: Yes.
Q: Did you head off in there?
A: Yes.
Q: Well that's up the creek. The creek runs toward the highway there, toward US Highway 31, that would be considered up the creek then wouldn't it—from where your car was parked down in front of the bridge?
A: Well anyway, I started off—I hadn't caught any fish. I took and set the line—baits had got low
Q: What got low
A: Worms and bait
Q: Oh?
A: They wasn't biting too good—Bite slow.
Q: Had you caught some fish?
A: No, sir—I took and hung one but I lost him.
Q: How long had you been down there—do you have any idea?
A: Hadn't been down there but just a little while—then she took and I came back out again. She was standing on the bridge, chunking off the bridge.

Q: She was standing on the bridge throwing rocks in the creek?

A: Throwing off the bridge and I took and uh, so I went toward her and she stopped and I started talking to her. I asked her did she know how hot it had been and she said yeah and uh we sat there and talked and I asked her.

Q: You asked her, do you remember what you said to her?

A: I don't know.

Q: Did you ask her if she wanted a ride or wanted to go out and lay on if you remember?

Q: I understood you to say that after you shot him with your gun you might have shot him with his gun, was that what I understood you to say?

A: Yes sir—well one gun—I don't know—I don't guess it makes too much difference which gun you know it was one gun

Q: How come you to cut him with your knife?

A: Suh

Q: How come you to cut him?

A: Trying to get him off me.

Q: Did you cut him off of you?

A: I cut him till he got to the tree and he fell there—

Q: Did you cut him any more after he fell?

A: Not that I know of. I don't know

Q: Where all did you cut him, do you remember—do you know.

A: I trying to get him off me—I don't know. I don't know where all I cut him.

Q: Did you uh, do you remember cutting him in the back of the head?

A: I stuck him, I don't know.

Q: You don't know for sure where you stuck him, you just sticking?

A: Yes sir

A: Yes sir

Q: Do you remember sticking him around the shoulder or the throat or anyplace like that?

A: He was so close, I probably, I probably did stick him around the shoulder. He was pretty close on me. All I could do was just

Q: Do you remember shooting him any more after he fell?
A: After he fell?
Q: Did you fall with him? Where you left him laying?
A: I like to fall but I caught, I don't know for sure whether I shot him again or not.
Q: Do you remember cutting him any more there after he fell?
A: I might have. I don't know.
Q: Billy after you went out, went out got your car—pushed his car out of the way and then drove back in there again back to him, the time that you went back and got his bill fold—was he still alive when you got to him that time?
A: I don't know. After I got back to him (inaudible) I thought had down to call, I took that pocketbook out. I didn't even look down to see what it was until the officers and everything.
Q: Did the pocketbook have any money in it.
A: I think it had a dollar or two in it—I think. I don't know. I think I saw when I pulled it out—I think it had one or two in it—I don't know.
Q: Did you, you know you left in your car and you got out to the road, I believe you said and you turned around nearly to the bridge and you turned around and went back and got his bill fold, was he moving or anything then?
A: I don't think so.
Q: When you got his bill fold?
A: I don't know. I don't believe he was moving.
Q: Did you shoot him or cut him anymore then?
A: No sir
Q: You probably remember that if you did?
A: Yes sir
Q: Well, I believe you could remember if you did shoot him again or cut him after you went back, or could you?
A: I think I cut him.
Q: You did, you cut him?
A: I think I could remember

Q: Oh, you think you could remember? Well, do you remember?
A: I don't remember after I went back in there, after I went back in there to take help in there he was laying beside the tree and I took and got his pocketbook and uh
Q: Was he lying on his back, or his face, or how when you went back?
A: Sir
Q: How was he lying when you went back?
A: He was laying just stretched out down there.
Q: On his back, or his face?
Q: He was lying sorta, kinda
Q: On his side?
A: Kinda half way—something
Q: Was he on his side or twisted—was his face up or down?
A: Head turned
Q: Head turned over side ways?
A: Yes sir
Q: and uh, well, was his stomach up or down, do you remember that?
A: Suh
Q: His stomach, was it facing up toward the sky or toward the ground?
A: I think it was facing up, I'm not for sure
Q: I think it was facing up.
A: Yes sir
Q: Well, did he move or anything when you went back down there that you remember of?
A: I don't know—not that I knows of—I don't know.
Q: This little gun you say you had in your pocket, you say it was a 25 automatic?
A: Sir.
Q: That little gun that you said you had in your pocket, your gun, you said it was a 25 automatic?
A: 25?
Q: Yes, 25 caliber, automatic, is that what you said it was?
A: I thought it was—that I said something about?

Q: Yes
A: 22
Q: 22?
A: Yes sir
Q: Uh huh
Q: You said a 25 awhile ago.
A: 25
Q: 25 automatic
Q: What kind of pistol did you have? Talking about your pistol?
A: Oh, 22—25—yes mines a 22.
Q: You said today it was a 25, you said awhile ago it was a 25 where did you get that pistol.
A: I got it from a boy down in Hartselle, at least he not a boy, hes a grown man, he all times wants to
Q: What's his name?
A: I forget—they call him Joe.
Q: They call him Joe—white or colored man?
A: White man
Q: White man
A: Yes sir
Q: Did you buy the gun from him?
A: Yes sir
Q: What did you give for it?
A: $15.00
Q: $15.00—How long have you had it?
A: I've had it a long time.
Q: What do you call a long time?
A: I had it round about, bout 4 or 5 months.
Q: 4 or 5 months?
A: Yes sir
Q: Joe—do you remember his last name?
A: Naw suh, I don't remember his last name. All I heard him called was Joe something.
Q: What'd he look like?
A: Tall fellow—his rough looking face.
Q: Rough looking face?
A: Yes sir
Q: What color was his hair?
A: Sandy

Q: Sandy
Q: Almost the color of Capt. Williams hair, that's what you call brown, I believe, is it lighter or darker than that, can you remember?
A: I don't know, I think
Q: Would you know if his last name if you heard it?
A: Yes sir, I think so. Oh, don't know, I don't know if its a knickname or what they call him.
Q: What does he do besides peddle these guns and pocket knives on the street there?
A: He don't do nothing I know of. I don't know of the time I got to town he wasn't standing on that street corner.
Q: Where does he hang out mostly.
A: He hangs mostly at that little newspaper stand.
Q: On main street there?
A: Yes sir
Q: On which side of Main Street?
A: Sometimes on ome side and sometimes on the other.
Q: You know where the old high way used to come down through town? Yeh, the other street that crosses main street there that uh—where the traffic light is?
A: Yes sir
Q: Now which—was it back toward the Main highway from there or was it back toward Huntsville.
A: I believe it was back toward Hartselle.
Q: Where he hangs out?
A: He just roams
Q: All down the street?
A: Yes sir
Q: You know where he lives?
A: Somewhere on Sparkman Street.
Q: Somewhere on Sparkman Street.
A: Somewhere in there—I don't know.
Q: Have you ever seen him in a car?
A: Nawsir—Mostly I seem him he was just walking around.
Q: About how old a fellow is he?
A: I'd say about 30-35 somewhere along in there.
Q: 30-35 somewhere in that neighborhood?
A: Yes sir

Q: Where did you get your shells?
A: Sir.
Q: Where did you get the shells?
A: Just different places.
Q: Where did you buy the last shells for it?
A: Last ones? It might have been Hunters.
Q: Mrs. Hunters'?
A: Im trying to think—now the last ones I got at the other store.
Q: Have you bought some for it at Hunters'
A: Sir
Q: Have you bought some shells for it at Hunters?
A: Yes, sir, I have bought some shells there at Hunters —I bought some at Billy Joes—this side of Hartselle there.
Q: Newby? Is it a filling station and store—little brick —kind of a heavy set man running it?
A: Big man
Q: Uh huh—but you don't remember for sure—now back to where this, uh, shooting took place. You don't remember for sure whether you shot him all with your gun, er, some with yours and some with his or all with his—yeah, I believe you did say—you know you shot him with your gun. Is that right?
A: Yes sir
Q: But you are not sure whether you shot him with his gun or not.
A: I'm not sure.
Q: You believe you did? Or didn't
A: I'm not sure about that—everything happened so fast—I was trying to get away. After I got out there and turned and come back that time the polices was setting there when I came back out.
Q: Oh, I see, well now Bill, how long have you known this girl?
A: I saw her.
Q: Have you ever talked to her before?
A: I spoke to her.
Q: Have you ever carried her out before?
A: Naw suh

Q: Now did she—did she really willingly get in that car today. Well, it don't make any particular difference —you are in bad enough trouble—I want to be frank with you—as it is. Did she willingly get in the car or did you pull your gun on her—just the truth?
A: I didn't have to—
Q: Did you tell her what you wanted before she got in the car?
A: I told her I axed her if she wanted to go to ride, she say, "why not". I told her when she got in, I say get on the bottom.
Q: Do you want to let us write this down, what you have told us. Let you read it and make sure weve got it correct?
A: Write it down?
Q: I say do you want it—to write it down so we won't forget what you have told us—just write it down like you—like youve told us, just write it down like you—like you've told it, then let you read it and see if it right?
A: I don't care.
Q: You don't care?

Officer:

A: Well, I think er—we should—then we'll all—we'll all remember it better
Q: Can you read and write, Billy?
A: Yes sir
Q: How far did you go in school?
A: Ninth grade.
Q: You went through the 9th grade?
A: Not compeltely—in the 9th grade.
Q: You went to the 9th grade? How long has it been since you've been to school?
A: Last week.
Q: Last week—oh, you're still going to school then, is that right?
A: Yes sir
Q: You're going to school now?
A: Yes sir, I guess you would say I was.
Q: Where do you go to school?
A: Morgan County Training School

Q: Morgan County Training School?
A: Yes sir
Q: How old are you anyway Billy?
A: 18
Q: 18, when were you 18?
A: Last August.
Q: Last August? You'll be 19 then in a coupel of months, this is the first day of May. What day in August?
A: Third.
Q: Third day of August?
A: Yes.
Q: What is your birthday August 3rd what year?
A: 45
Q: 45
Q: Anything else Captain you can think of?
Cpt. Williams: I can't think of anything else, I just, I just want Billy to be sure he knows everything he is telling is the truth, we just want the straight of it, Billy. We don't want—I told you
Q: Well, we'er we just wanted to get it from you free and of you own accord. We hadn't threatened you or forced you to do anything. Have we?
A: Naw sir
Q: We haven't promised you anything to get you to talk with us have we? We just want the straight of it, and I believe you told me while ago that you would be willing to go back down there if we wanted you to and try to show us what happened. Re-enact exactly what happened at the scene is that right?
A: Yes sir
Q: Do you think it would help you remember any better if you did go back down there and kind of show us what happened.
A: I don't know if it would help any, I just want to get it straightened out as soon as I can?
Q: Want to get it straighted out as soon as you can? We want to find that little gun of yours. Do you think you can show us where you throwed it away?
A: I remember where I throwed it down—whether I can go find it though I don't know.
Q: You don't remember whether you throwed it there or whether you took off running and throwed it.
A: I don't know so much about that.

Q: Well are you sure you throwed it?
A: Yes sir, I'm sure I throwed it.
Q: Which direction?
A: Towards the creek.
Q: Towards the creek?
A: Back toward—I might have throwed—I don't know (whine)
Q: Why did you throw it away? Was it empty?
A: Yes sir
Q: It was empty?
A: It snapped.
Q: Well it had quit shooting then in other words. How many shells did you have in it to start with?
A:
Q: Yeah
A: About 5 I guess—4 or 5—something like
Q: How many does it hold?
A: 6
Q: Holds 6?
A: Yes sir
Q: I thought I heard you say while ago it held seven when we first started talking.
A: Holds six.
Q: Six—it is an automatic, has a little clip, you load and push up in it, is that right?
A: It's one of those kind, you hold and squeeze back here and cartridge will jump out.
Q: Uh huh—put the shells in and the shells will jump out. Does it jump out the bottom of the hand grip?
A: Jump out the side—
Q: The thing you put the shells in jump out the handle?
A: Yes sir
Q: Then you put the shells in and push it back up in the handle
A: Yes sir
Q: And then when you shoot it the shell goes out the side—the empty shell—don't it?
A: Somthing like that.
Q: What did you buy the gun for?
A: I used to stay out on the road a lots at night and er

Q: Have you ever been out to target practice with it? Shoot at anything before this?
A: Not to any
Q: Well you have shot it before haven't you—Do you remember where you shot it some? You ever had target practice and shot it in a tree, or shot in an old can or something?
Q: You say you bought shells 2 or 3 different or more times than one. You bought some from Mr. Newby and some from somebody else. In other words, you've shot more than one box shells in it now haven't you?
A: Yes, sir.
Q: Where did you shoot at—just an old cans and stuff?
A: Sometime just target shot—
Q: Could you hit pretty good with it?
A: Not to do any hitting cause it, if you know
Q: Can't hit to good at a distance with it?
A: Yes sir
Q: Why did you take it out of your car, or wherever you had it and put it in your pocket today, I believe you said it was in the glove compartment to start with?
A: Yes, sir.
Q: Why did you take it out of the glove compartment today?
A: Don't know.
Q: Don't know? Did you take it out of the car after you and the girl parked or before?
A: It was after, after we got ready to get out, I took it out
Q: Well let's get it written down and we'll be sure and have it right, then read it back and then tell us if it's right or wrong. This is much better than trying to remember say, a week or two or a month or two after it happened.
A: Yes, sir, you all ready told me.
Q: Did I say that? Let's or—well be back in just a minute.

STATE OF ALABAMA

OFFICE OF THE GOVERNOR

NAME	BILLY DON FRANKLIN BOULDEN
COUNTY	MORGAN
OFFENSE	MURDER—1st Degree
CONVICTED	MAY 29, 1964
SENTENCE	DEATH—November 19, 1965.

EXECUTIVE ORDER

After oral hearing and careful consideration of the facts, circumstances and record in the case of the State of Alabama vs. Billy Don Franklin Boulden, it is my opinion that the said Billy Don Franklin Boulden should not receive executive clemency.

THEREFORE, let the sentence of the Court be executed as provided by law.

LET ORDER ISSUE ACCORDINGLY.

/s/ George C. Wallace
Governor

No. 9

November 16, 1965

Issued, Nov. 18, 1965, Secretary of State

In the Name and by the Authority

of

THE STATE OF ALABAMA

I, GEORGE C. WALLACE

Governor of the State of Alabama

To all Sheriffs, Keepers of Prisons, Civil Magistrates and others to whom these Presents shall come—GREETINGS:

WHEREAS, at the May 29th Term, 1964 of the ..... Court held for the County of Morgan, Billy Don Franklin Boulden was convicted of the crime of Murder—1st Degree and sentenced to Death—November 19, 1965

And Whereas, for divers good and sufficient reasons it appears to me that the said Billy Don Franklin Bouldin is not a fit subject for Executive Clemency;

Now, Therefore, I, Governor of the State of Alabama, by virtue of the power and authority in me vested by the Constitution and laws of the State of Alabama, do by these presents, hereby order, that the sentence of the Court be executed as provided by law.

Witness my hand, and the Great Seal of the State at Office, in the City of Montgomery, this 18th day of November, 1965

/s/ George C. Wallace
Governor of Alabama.

[STATE SEAL]

BY THE GOVERNOR:

/s/ Mrs. Agnes Baggett
Secretary of State.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM 1965

8 Div. 175

BILLY DON FRANKLIN BOULDEN

v.

STATE OF ALABAMA

Appeal from Morgan Circuit Court

LAWSON, JUSTICE.

Billy Don Franklin Boulden was convicted in the Circuit Court of Morgan County of the first degree murder of Loyd C. Hays. He was sentenced to death in accordance with the verdict of the jury. He has appealed to this court under the automatic appeal law applicable to cases where the death sentence is imposed—Act 249, approved June 24, 1943, General Acts 1943, p. 217, carried in the 1955 Cumulative Pocket Part to Vol. Four, 1940 Official Code, and in the 1958 Recompiled Code as Title 15, §§ 382 (1) et seq.

Hays, a conservation officer of the State of Alabama, was killed on the afternoon of May 1, 1964. Boulden, a Negro, eighteen years of age, was taken into custody by law enforcement officers at the scene of the crime. The Honorable James N. Bloodworth, one of the Judges of the Circuit Court of Morgan County, was immediately notified of the crime and that Boulden was being held. Judge Bloodworth directed that Boulden be carried to the Limestone County Jail, in Athens, for safekeeping. He was kept there for several hours.

On the following morning, May 2, 1964, Boulden was brought to the Morgan County Court House before Judge Bloodworth, sitting as a magistrate. Boulden's father had been notified of the hearing to be held before Judge Bloodworth and was told that he could have a lawyer present if he so desired. The Sheriff of Morgan County had sworn

to affidavits before Judge Bloodworth charging Boulden with the first degree murder and robbery of Hays and with the rape of Ann Burnett, a fifteen-year-old married white girl. Warrants of arrest signed by Judge Bloodworth were served upon Boulden and returned to Judge Bloodworth at the hearing.

Boulden's father, mother, two brothers and three sisters were present at the hearing. Those present were told by the Judge that the purpose of the hearing was to explain to Boulden and his family the nature of the charges against him and to inform him of his constitutional rights.

Boulden was told the punishment which could be imposed upon him by a jury if he was convicted of any one of the three offenses with which he was charged. He was told that he had a right to a preliminary hearing and the nature of such a hearing was explained to him. He was told that he had the right to apply for a writ of habeas corpus and the right to petition for bail. The nature of these proceedings was explained to him. He was told that he had the right to employ counsel but that if he was financially unable to do so the court would appoint a lawyer to represent him, but that a court-appointed lawyer would not necessarily be the lawyer of his choice.

Boulden was advised that he did not have to say anything at the hearing or at any other time that would incriminate him. He was told that he did not have to submit to an unreasonable search and seizure and was advised that any evidence which may have been obtained by an unreasonable search and seizure could not be used against him in a court of law.

The manner in which an indictment is obtained was explained and he was told that if indicted the law would still presume him to be innocent until the State met the burden upon it to prove his guilt beyond a reasonable doubt.

Boulden was then asked whether the law enforcement officers had mistreated him in any way or threatened to do so. He replied in the negative. Boulden stated that food and water had been furnished him and that he had not been denied bathroom privileges.

He was advised by Judge Bloodworth that it would be wise for him not to make any decision about his future course in court until he had talked to his lawyer.

Judge Bloodworth informed Boulden that he would be taken to Kilby Prison for safekeeping but that his lawyer, whether employer or appointed, would be able to see him there. At the conclusion of the hearing Boulden consulted with his family and was then taken to Kilby Prison near Montgomery.

Boulden was indicted for the murder of Hays by a grand jury of Morgan County on May 7, 1964. He was unable to employ counsel so prior to arraignment the trial court, under the provisions of § 318, Title 15, Code 1940, appointed an experienced member of the Morgan County Bar to represent him.

Before arraignment Boulden, by demurrer, challenged the indictment and each count thereof on several grounds. The demurrer was overruled.

Upon arraignment, Boulden pleaded not guilty and not guilty by reason of insanity. The court-appointed attorney was present at arraignment.—*Hamilton* v. *Alabama*, 368 U. S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114.

After pleading to the indictment, Boulden moved the court "to commit him to an insane hospital for evaluation." The motion was overruled following a hearing.

The case came on for trial on May 27, 1964, and was concluded on May 29, 1964. As heretofore indicated, the jury found Boulden guilty of murder in the first degree and imposed the death penalty. He was duly sentenced on May 29, 1964. Court-appointed counsel was present throughout the proceedings, from arraignment through sentence.

The attorney who represented Boulden in the court below was appointed to represent him on this appeal. He has filed a brief on Boulden's behalf.

Indictment

The indictment contains four counts, each charging murder in the first degree. The counts are identical except as to the means by which the offense is alleged to have been committed. In the first count, it is alleged that Boulden killed Hays "by shooting him with a gun or pistol"; in the second count, "by cutting him with a knife";

in the third count, "by shooting him with a gun or guns, or by shooting him with a pistol or pistols, or by cutting him with a knife or other sharp instrument"; and in the fourth count, "by cutting his throat with a 'Tree Brand' pocket knife."

The second and fourth counts are substantially in compliance with Form 79, § 259, Title 15, Code 1940, and therefore are sufficient as against the demurer.—*Aikin* v. *State*, 35 Ala. 399; *Noles* v. *State*, 24 Ala. 672; *Franklin* v. *State*, 233 Ala. 203, 171 So. 245; *Rice* v. *State*, 250 Ala. 638, 35 So. 2d 617.

The first and third counts are also in substantial compliance with Form 79, *supra*, except that they charge in the alternative the means by which the offense was committed. This is permissible under the provisions of § 247, Title 15, Code 1940. But when the means by which an offense was committed are charged in the alternative, each alternative charge must describe the means with the same definiteness or particularity as would have been required had the charge been made separately in a separate count.—*Rogers* v. *State*, 117 Ala. 192, 23 So. 82; *State* v. *Nix*, 165 Ala. 126, 51 So. 754, and cases cited; *Duncan* v. *State* (Ala.), 176 So. 2d 840. An indictment in the language of the first count was held good by our Court of Appeals in *Bufford* v. *State*, 23 Ala. App. 521, 128 So. 126. The third count is more involved. It alleges, in effect, that Hays died as a result of bullet wounds inflicted by a pistol or pistols or by a gun or guns, or as a result of cuts inflicted by use of a knife or other sharp instrument. While the third count may have been unnecessary in view of other counts in the indictment, we can understand why it was drawn and included, in view of the multiple wounds on the body of Hays, some caused by bullets, others by some kind of sharp instrument. It was drawn to meet the proof which would be adduced as to the exact cause of death. We are of the opinion that the third count sufficiently advises the accused of the means by which the State claimed he killed the deceased. Each alternative was sufficient under our holdings in *Rogers* v. *State*, *supra*; *State* v. *Nix*, *supra*; and *Duncan* v. *State*, *supra*. In regard to the last alternative in the third count, that is, that Boulden killed Hays by cutting

him "with a knife or other sharp instrument," see *Rowe* v. *State*, 243 Ala. 618, 11 So. 2d 749.

The demurrer to the indictment was properly overruled.

Motion for Commitment for Sanity Evaluation

By this motion counsel for Boulden apparently sought to invoke the authority granted the trial court by the provisions of § 425, Title 15, Code 1940, which reads:

> "Whenever it shall be made known to the presiding judge of a court by which an indictment has been returned against a defendant for a capital offense, by the written report of not less than three reputable specialist practitioners in mental and nervous diseases, appointed by the judge, or by the written report of the superintendent of the Alabama state hospitals, that there is reasonable ground to believe that such defendant was insane either, at the time of the commission of such offense, or presently, it shall be the duty of the presiding judge to forthwith order that such defendant be delivered by the sheriff of the county to the superintendent of the Alabama state hospitals, who is charged with the duty of placing such defendant under the observation and examination of himself and two members of his medical staff to be named by him, constituting a commission on lunacy, with the view of determining the mental condition of such defendant and the existence of any mental disease or defect which would affect his present criminal responsibility, or his criminal responsibility at the time of the commission of the crime.
>
> * * * *"

In *Howard* v. *State*, 3 Div. 162, Alabama Supreme Court MS, decided on June 30, 1965, in upholding the action of the trial court in overruling a similar motion, we said:

> ". . . the court is under no duty to appoint a lunacy commission or to procure a report of the Superintendent of the Alabama State Hospitals under Tit. 15, Section 425, Code 1940. The court has simply the

right to seek these aids for advisory purposes when the court, *in its discretion*, thinks such aids will be helpful. Campbell v. State, 257 Ala. 322, 58 So. 2d 623; Oliver v. State, 232 Ala. 5, 166 So. 615." (Emphasis supplied)

See *Aaron* v. *State*, 271 Ala. 70, 122 So. 2d 360; *Lokos* v. *State*, Alabama Supreme Court MS, this day decided.

We hold that error to reverse is not made to appear in the trial court's action in overruling the motion presently under consideration.

The Facts

The evidence on behalf of the State is substantially as hereinafter summarized.

On May 1, 1964, around 4:00 P.M., near U. S. Highway 31 in rural Morgan County, Boulden encountered Mrs. Burnett on a road near Flint Creek. They traveled in his car some distance into the surrounding woods on a dirt road, and there near the bank of a creek engaged in sexual intercourse. Mrs. Burnett testified that she was forced by Boulden to have sexual intercourse with him.

After completion of this act, they were walking back to appellant's automobile, which was parked some distance away, when Hays encountered them in the road.

Hays asked them what they were doing there. Mrs. Burnett then ran screaming from the side of appellant to a position behind the officer. At this time Boulden drew a .22 calibre automatic pistol he had on his person and fired it at Officer Hays until it either became empty or quit firing. Boulden then secured Hays' .38 calibre revolver and fired it at him until it ceased to fire. Boulden then drew and opened a pocket knife which was concealed on his person and proceeded to cut and stab with it until Officer Hays ceased resistance and fell to the ground.

The appellant then fled the scene, taking with him the officer's pistol, holster and wallet.

While the altercation between Officer Hays and Boulden was taking place, Mrs. Burnett ran out of the woods to the main road and there came upon Holly Marie Shull, her stepcousin, whose disabled car Mrs. Burnett had left

in search of aid prior to encountering Boulden, and one Louis Compton, a nearby resident.

Mrs. Burnett, Mrs. Shull and Compton then proceeded to a service station some distance away to seek assistance. Mr. Compton flagged down two officers as they passed the service station on patrol, and after talking with Mrs. Burnett these officers hurried to the scene of the cime. Upon turning into the woods road they met Boulden driving out in his car.

The officers approached Boulden's car with guns drawn and asked him for his driver's license. The license he handed them bore the name "Loyd Hays," the name of the deceased. The officers then arrested Boulden and searched his person and his car, and on walking down the woods road found Hays' body.

Boulden testified in his own behalf. His testimony in regard to the shooting and cutting of Hays varies only slightly from the testimony offered by the State. He said that he did not start shooting until after Hays had made a motion to draw his pistol. Boulden admitted that he had sexual intercourse with Mrs. Burnett but claimed that it was with her consent. Mrs. Burnett's testimony was to the effect that Boulden drew his pistol on her and forced her into his automobile, kept the pistol pointed at her while they drove to the place where the act or acts took place, and even kept the pistol pointed at her while the act or acts of sexual intercourse occurred.

We have not attempted to make a detailed statement of the evidence. We think the above summary will suffice. However, we will discuss some of the evidence in more detail in connection with our treatment of some of the questions which we will discuss.

Exhibits

Exhibit 1 is a picture of Hays taken some time before the day of the crime. It was used in connection with the examination of witnesses for the purpose of identification. It was admitted without error.—*Malachi* v. *State*, 89 Ala. 134, 8 So. 104.

Exhibits 7 through 18 and Exhibit 45 are photographs of Hays' dead body. They were admitted without error.—

Washington v. *State*, 269 Ala. 146, 112 So. 2d 179, and cases cited.

Exhibits 19, 20, 23, 24, 25, 31 and 32 are pictures of the scene of the homicide. They were properly admitted. —*Blue* v. *State*, 246 Ala. 73, 19 So. 2d 11; *Green* v. *State*, 252 Ala. 513, 41 So. 2d 566; *Henry* v. *State*, 277 Ala. 247, 168 So. 2d 617.

Exhibits 6 and 21 are diagrams of the *locus in quo* and surrounding territory. The entries on the diagrams were shown by witnesses to properly represent the true situation. They were properly admitted.—*Hardie* v. *State*, 260 Ala. 75, 68 So. 2d 35; *Bosarge* v. *State*, 273 Ala. 329, 139 So. 2d 302.

Exhibits 26, 27 and 28 are aerial photographs of the scene of the homicide and surrounding territory. They were admitted without error.—*Aaron* v. *State*, 271 Ala. 70, 122 So. 2d 360. The same is true of Exhibits 26A, 27A and 28A, which are plastic covers or overlays placed over the aerial photographs on which identification markings were placed showing the location of pertinent points.

Exhibits 2, 3, 4, 22, 41, 42 and 44 are articles of clothings and other apparel worn by Hays at the time of the homicide. They were admitted without error.—*Walker* v. *State*, 223 Ala. 294, 135 So. 438; *Roberts* v. *State*, 258 Ala. 534, 63 So. 2d 584; *Barbour* v. *State*, 262 Ala. 297, 78 So. 2d 328.

Exhibits 38 and 39 are the shirt and trousers worn by Boulden at the time of the homicide. They were properly admitted in evidence.—*Teague* v. *State*, 245 Ala. 339, 16 So. 2d 877; *Floyd* v. *State*, 245 Ala. 646, 18 So. 2d 392.

Exhibit 37 is a revolver containing six fired cartridges and Exhibit 38 is a holster which held the revolver at the time the revolver and holster were found in Boulden's car. The revolver and holster belonged to Hays or were in his possession at the time of the homicide. Those articles were admitted in evidence without error, as they tended to connect Boulden with the commission of the offense.—*Frost* v. *State*, 225 Ala. 232, 142 So. 427. The same is true of Exhibit 33, a black wallet containing sixteen dollars, which the evidence shows belonged to Hays but was in the possession of Boulden at the time of his arrest at the scene

of the crime. Exhibit 34 is a black wallet found on Boulden at the time of his arrest, which contained identification and other papers. We think it was admitted without reversible error. Exhibit 5 is a small red holster which the evidence shows was worn by Boulden at the time of the offense and at the time of his arrest. Exhibit 35 is a long piece of wire found in Boulden's pocket at the time of his arrest. The admission of these articles does not constitute reversible error.

Exhibit 43 is a shoe found near the scene of the crime. It was shown to have been worn by Mrs. Burnett at the time of the homicide and to have been lost by her as she fled from the scene. We can see no injury to the appellant, Boulden, by the court's action in permitting the shoe to be introduced.

Exhibit 36 is a pocket knife which was found on Boulden at the time of his arrest. The evidence showed that blood and "a fatty material" of human origin were found on the blade of the knife. Since the evidence showed that Hays' throat had been cut and his body cut and stabbed several times, we are clear to the conclusion that the knife was properly admitted in evidence.—*Brown* v. *State*, 229 Ala. 58, 155 So. 358.

Exhibit 40 is a part of the taillight assembly off of Boulden's car. The evidence shows that as Boulden sought to leave the scene in his car, he had to push Hays' car out of his way. The evidence also shows that paint of the color and consistency of that on Hays' car is on Exhibit 40 and it was, therefore, properly admitted in evidence as tending to corroborate the other evidence which placed Boulden at the scene of the crime.

We have not overlooked the fact that Exhibits 5, 33, 34, 35, 36, 37 and 38 were taken from Boulden's person or from his car at the time of his arrest and that the prohibition of the federal constitution against unreasonable searches and seizures is applicable to trials in the courts of this state by virtue of the decision of the United States Supreme Court in *Mapp* v. *Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081. See *Duncan* v. *State*, (Ala.), 176 So. 2d 840. But there was no motion to suppress nor objection interposed to the introduction of those exhibits

on the ground that they were obtained by unreasonable searches and seizures. See *Sanders* v. *State*, Alabama Supreme Court MS, 6 Div. 130, this day decided. However, as to these exhibits, we do not think a motion to suppress or an objection would have been well taken for, as shown above, each of them was seized from Boulden's person or from his car, which was in his possession and under his control at the time of his arrest.—*Preston* v. *United States*, 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 777. The arrest was lawful, for the arresting officers unquestionably had reasonable cause to believe that Boulden had committed a felony.—§ 154, Title 15, Code 1940. See *Union Indemnity Co.* v. *Webster*, 218 Ala. 468, 118 So. 794; *Knox* v. *State*, (Ala. Ct. of App.), 172 So. 2d 787, *cert. denied*, (Ala. Sup. Ct.), 172 So. 2d 795.

Exhibit 40, a part of a taillight assembly, was apparently removed from Boulden's car some time after his arrest, so its admissibility might have been questionable if a motion to suppress or objection had been interposed to its introduction on the ground that it was obtained as a result of any unlawful search and seizure But there was no such motion or objection.—*Sanders* v. *State*, *supra*. The same is true of Exhibits 36 and 37, Boulden's shirt and trousers, and the record fails to reveal the manner in which those articles came into the possession of the State.

Confession

As shown above, Boulden was taken to the Limestone County Jail in Athens shortly after he was arrested on the afternoon of May 1st. As far as this record discloses, he made no statement there. He was taken to Kilby Prison, near Montgomery, on May 2nd following his appearance before Judge Bloodworth in Decatur, at which time he was advised of his constitutional rights. He remained in Kilby Prison until May 6th and it does not appear that he made any confessory statement while in Kilby. He was not kept incommunicado while in Kilby. He was visited by a member or members of his family while there.

On the morning of May 6th Boulden was transported from the prison to the scene of the crime in Morgan County in an automobile driven by the sheriff of that county.

The sheriff and Boulden were accompanied on the trip by Captain Williams and Lieutenant Watts of the Alabama Department of Public Safety and by Deputy Fire Marshal Howard Dees.

After reaching the scene of the crime Boulden confessed, according to the testimony of Captain Williams and Lieutenant Watts. The sheriff and Dees did not testify.

Lieutenant Watts was the first witness called by the State for the purpose of proving the confession. As soon as it became apparent that Watts was to be questioned by the State concerning a confession, counsel for Boulden requested a *voir dire* examination of the witness outside the presence of the jury. The request was granted and the jury was excluded.

After the jury left the courtroom Watts testified in response to questions propounded by the Solicitor and by the Court that on no occasion when he was present with Boulden did anyone threaten, abuse or intimidate Boulden or offer him a reward to get him to confess.

The Court then advised counsel for Boulden that he could proceed to examine Watts on *voir dire*. He did so. The testimony of Watts outside the presence of the jury is in substance as follows. He first saw Boulden at the scene of the crime late in the afternoon of May 1st. He next saw him in the Limestone County Jail at about ten-thirty that night, when witness and Captain Williams questioned him. The questioning began just before eleven o'clock and lasted until shortly after midnight. The questioning, including note-taking, lasted not over two hours. Before the questioning began, Boulden was advised by Captain Williams that he did not have to make a statement and that any statement he made might be used against him. During the questioning Boulden was given food and he had access to a bathroom where water was available. He was allowed to smoke. He was not abused or manhandled and there were no marks on his body. The next time he saw Boulden was in the Morgan County Courthouse in Decatur early on the morning of May 2nd, when Boulden was advised as to his constitutional rights in the presence of his parents and other members of his family. He did not have a lawyer at that time but he was

told that he or his family could employ a lawyer and that if they were unable to do so that a lawyer would be appointed for him and that he would be permitted to confer freely with his family and his lawyer. The next time witness saw Boulden was around noon on May 6th just before the trip back to the scene of the crime. During the trip Boulden sat in the back seat between witness and Captain Williams. Boulden did not cry or make any protest. No one hit him or abused him or talked to him in a loud voice or cursed him. No one promised him anything or told him what to say. Boulden talked freely and laughed during the trip. He said some members of his family had been to see him while he was in Kilby Prison.

Counsel for Boulden started to examine him concerning the confession on this occasion while the jury was excluded but changed his mind when the trial court ruled that if he did so examine him Boulden, under our case of *Fikes* v. *State*, 263 Ala. 89, 81 So. 2d 303, would be subject to being questioned by the State as to his participation in the crime.

The trial court determined outside the presence of the jury that the State had shown prima facie that the confession about which Watts was to testify was voluntarily made. The jury was recalled and the Solicitor proceeded to question Watts concerning the confession, after having elicited from him in the presence of the jury a negative answer to the question whether he or anyone in his presence on the way to the scene of the crime from Kilby Prison, or after reaching the scene, offered Boulden any reward, inducement or promise to get him to make a statement or threatened him or abused him in any way to get him to make a statement.

Watts explained in detail what occurred after he, Captain Williams, Boulden and the other occupants of the car reached the scene of the crime on the afternoon of May 6th. We will not set out his evidence in detail. Suffice it to say that it shows that Boulden admitted that he shot and cut the deceased. On cross-examination, counsel for defendant brought out testimony tending to show that Boulden also made statements to the effect that he had raped Ann Burnett prior to the killing. On redirect the State went into that phase of the case.

Captain Williams was also called as a witness by the State to testify as to the confession made by Boulden at the scene of the crime on the afternoon of May 6th. This is the same confession about which Lieutenant Watts had testified. There was no request made by counsel for Boulden that the jury be removed from the courtroom while the voluntariness of the confession was determined. This witness was asked substantially the same questions by the Solicitor as had been asked Watts as to whether Boulden had been threatened, abused or mistreated in any way or had been offered any reward to make a statement. He gave negative answers to all such questions. Captain Williams was then permitted to state without objection the statements made by Boulden wherein he admitted his guilt. Williams' testimony in regard to the confession was substantially the same as that given by Watts. On cross-examination Williams was asked if he told Boulden on May 1st, May 2nd or May 6th that there were people who wanted to kill him and if he would confess, witness would guarantee his safety. Williams denied making any such statement.

We have here no evidence of physical brutality or threats thereof, or of reward or promise of reward; no evidence that Boulden was removed from jail to jail at night for questioning in secluded places. There is no evidence that Boulden was ever required to disrobe or to stand on his feet for long periods during questioning or denied food, sleep or bathroom facilities. There is no evidence of protracted questioning. As far as this record discloses, Boulden was never placed under a high-powered light during questioning or questioned in a place containing any such device. Boulden was not deprived of the services of a lawyer prior to the time the confession was made. He had made no effort to obtain the services of a lawyer, although he had been advised to do so.

True, Boulden was an eighteen-year-old Negro boy who was charged with the murder of a white man in Alabama. If those facts alone make his confession inadmissible, then some federal court will have to so declare. We will not. Boulden was not, according to this record, mentally deficient, although he and his mother testified that he occa-

sionally had fits and was nervous. He is not illiterate. He was in the ninth grade at the time of the crime.

We have given careful consideration to the State's evidence as it pertains to the circumstances and conditions shown by the record to have existed from the time Boulden was arrested to the time the confession was made, and we are of the opinion that they were not such as to be inherently coercive or to have deprived Boulden of his free will to choose either to admit his guilt, to deny it or to remain silent. We think the trial court correctly admitted the confession in evidence under the decisions of the Supreme Court of the United States cited in *Phillips* v. *State*, 248 Ala. 510, 28 So. 2d 542. Nor do we think our holding there is in conflict with *Watts* v. *Indiana*, 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801; *Payne* v. *Arkansas*, 356 U. S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975; *Gallegos* v. *Colorado*, 370 U. S. 49, 82 S. Ct. 1209, 8 L. Ed. 2d 325; *Haley* v. *Ohio*, 332 U. S. 596, 68 S. Ct. 302, 92 L. Ed. 224; *Culombe* v. *Connecticut*, 367 U. S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037; *Blackburn* v. *Alabama*, 361 U. S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242; *Turner* v. *Pennsylvania*, 338 U. S. 62, 69 S. Ct. 1352, 93 L. Ed. 1801; *Johnson* v. *Pennsylvania*, 340 U. S. 881, 71 S. Ct. 191, 95 L. Ed. 640.

We think the facts and circumstances here, in their totality, are different from those in the cases cited above. It would be meaningless to further lengthen this opinion by attempting to make a comparison of the facts in the cited cases and the facts in this case, in that the Supreme Court of the United States has frequently stated that, when faced with the question whether there has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession that court must make an independent determination on the undisputed facts.—*Stroble* v. *California*, 343 U. S. 181, 72 S. Ct. 599, 96 L. Ed. 872. That court has said that no exact formula for determining whether a confession was voluntary can be established and takes the case-by-case approach and declares legal principles only in the context of specific factual situations. The result is almost one of frustration to state courts and judges.

Under the facts of this case, we do not think that the holding of the United States Supreme Court in *Escobedo* v. *Illinois*, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, discussed at length in *Duncan* v. *State*, (Ala.), 176 So. 2d 840, requires a reversal of the judgment below because a lawyer was not present at the time the confession was made. Also see *Lokos* v. *State*, Alabama Supreme Court MS, 2 Div. 463, and *Sanders* v. *State*, Alabama Supreme Court MS, 6 Div. 130, this day decided. The evidence shows that shortly after his arrest on the night of May 1, 1964, while being held in the Limestone County Jail, Boulden was told by Captain Williams that he did not have to make a statement and that any statement he made might be used against him. And, as we have shown heretofore, Judge Bloodworth on the following morning took great pains to explain to Boulden, in the presence of members of his family, his constitutional rights, saying in part:

> "You have a right, under the Constitution, to have a lawyer to represent you if you choose to hire one of your own choice. If you don't choose to hire one, unable, if you are too poor to hire one, then the Court appoints one for you at the State's expense. That lawyer would either be appointed by the other circuit judge, Judge Powell, or myself. This hearing today is not to appoint a lawyer, but to explain to you your rights. You also have a right, a privilege, under the Constitution, against self-incrimination; that is, you do not have to say anything to the court today or any other time, or any officers of the law or anybody, say anything that might tend to incriminate you; that is, something that might connect you with these offenses. You don't have to say that, you understand. You can claim your privilege against self-incrimination. You can claim you don't want to say anything and you have a right to that. . . ."

On the same occasion the following transpired:

> "Now, I have already explained to you that for your own safekeeping I propose to transfer you to Kilby Prison, and if you have a lawyer that your family wants to engage or hire, that lawyer can see you there. I will see that you are available to him. If a lawyer

has to be appointed for you, then he will be given opportunity to visit you and to consult with you. Do you understand that?

"MR. BOULDEN: Yes, sir.

"THE COURT: Do you understand what I have said to you?

"MR. BOULDEN: Yes, sir.

"THE COURT: What I have explained to you?

"MR. BOULDEN: Yes, sir.

"THE COURT: Do you have any questions you want to ask me?

"MR. BOULDEN: No, sir.

"THE COURT: You understand you don't have to say anything that would tend to incriminate you, and anything you do say could be used against you in court. Do you understand that?

"MR. BOULDEN: Yes, sir.

"THE COURT: Now, I want to ask you this. If the law enforcement officers have mistreated you in any way. Have they physically hurt you in any way?

"MR. BOULDEN: No, sir.

"THE COURT: Have they threatened you or beat you or anything like that?

"MR. BOULDEN: No, sir.

* * * *

"THE COURT: . . . I would advise you not to make any decision about your future course in court until you talk to your lawyer. . . ."

Thereafter the Court made the following statement to those present:

". . . Now, you all understand you have a right to engage a lawyer for him. If you do not do that we will have to appoint a lawyer for him, but he won't be a lawyer of your choice, because if you want one of your own choice you have to engage your own, and I would advise you, if you are able, that you do so as soon as possible. You can see about that today, and we will try to cooperate with your lawyer in making him available to him at all times, . . ."

As we have heretofore shown, despite the advice given by Judge Bloodworth, neither Boulden nor his family sought to obtain the services of a lawyer, nor did Boulden request a lawyer before making the confession. Hence, we say again that the holding in Escobedo does not apply to this case under the "totality of circumstances" doctrine or otherwise.

We hold that the evidence does not support a finding that the confession was coerced.

After Watts had testified as to the confession made by Boulden at the scene of the crime on the afternoon of May 6th, counsel for Boulden on re-cross examination elicited from him testimony to the effect that a tape recorder was used at the scene of the crime while the confession was being made "to reduce the confession to a tape at the time it was actually uttered." Watts was then questioned by the State Solicitor concerning the use of the recorder. Watts said that he heard the entire conversation as it went on the tape and stated that unknown to Boulden, he had an "FM wireless microphone with him with which to broadcast to a receiver." The conversation was then put on a tape recorder from the receiver. The State thereupon offered in evidence a "transcription" of a part of the statement made by Boulden on the afternoon of May 6th at the scene of the crime. The "transcription" was shown to have been made from the tape recorder under Watts' supervision. Boulden's counsel objected to the introduction of the transcription on the sole ground that Boulden was not aware of the presence of the microphone. The objection was overruled and a copy of the "transcription" was admitted in evidence and read to the jury by the witness Watts.

The State then introduced in evidence without objection a copy of a "transcription" of another part of the conversation or statement made by Boulden on the afternoon of May 6th at the scene of the crime. It was shown to have been made at a place different from that where the first conversation occurred. The witness Watts read that statement to the jury.

Watts was later recalled to the stand in connection with the State's effort to have the tapes played before the jury.

Before permitting this to be done the trial court excluded the jury from the courtroom and the trial judge, counsel for the State and for Boulden, and the court reporter went to a witness room where the tapes were played. After the playing of the tapes outside the hearing of the jury, counsel for Boulden objected to them being played in the hearing of the jury on the following grounds: (1) The recordings were not taken voluntarily; (2) Boulden was not aware of the presence of the microphone which was secreted on the person of the witness Watts; (3) that a portion or portions of the recordings were inaudible and not understandable. The trial court overruled the objection. The trial judge, counsel for the State and for Boulden, and the court reporter returned to the courtroom, as did the jury. The two tapes were then played in the presence of the jury.

There is no merit in the contention that the statements made by Boulden which were transmitted through the microphone to the receiver and thence to the recorder were not shown to have been made voluntarily if we are correct in our holding that the record before us shows that the confession as testified to by Watts and Williams was made voluntarily, inasmuch as the tape recording was but the actual statements made by Boulden which were summarized in the testimony of Watts and Williams. The predicate which was laid for the introduction of the testimony of Watts and Williams in regard to the confession served to show the voluntary character of the recorded confession or statements.

Nor were such statements inadmissible simply because Boulden at the time he was making them did not know that Watts had a microphone concealed on his person. See *State* v. *Alleman*, 218 La. 821, 51 So. 2d 83; *State* v. *Lorain*, 141 Conn. 694, 109 A. 2d 504; *People* v. *Bodkin*, 196 C. A. 2d 412, 16 Cal. Rptr. 506; *Goldman* v. *United States*, 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322; *On Lee* v. *United States*, 343 U. S. 747, 72 S. Ct. 967, 96 L. Ed. 1270. Boulden was not entrapped or tricked to make the statements. He was perfectly aware of the effect of what he said and he had been told it could be used against him in court. Moreover, there could be no prejudicial error in

this matter for, as shown above, Watts testified that he was present during the recordings and he further testified that the tape as played was what he heard.—*People* v. *Bodkin, supra.*

The trial court did not err in overruling the objection interposed to the playing of the tapes in the hearing of the jury on the ground that a portion or portions of them were unaudible. The transcriptions which were introduced in evidence show that in only four instances was a stenographer unable to understand what was said. When these transcriptions are considered in their entirety in connection with the testimony of Watts and Boulden's testimony, we cannot see how Boulden could have been hurt by the playing of the tapes in the hearing of the jury.—*State* v. *Salle*, 34 Wash. 2d 183, 208 P. 2d 872; *Lindsay* v. *State*, 41 Ala. App. 85, 125 So. 2d 716, *petition for cert. stricken*, 271 Ala. 549, 125 So. 2d 725. The trial judge, as we have heretofore shown, heard the tapes played outside the presence of the jury and decided that they were sufficiently audible to be played in the hearing of the jury. We hold that reversible error is not made to appear in the trial court's rulings in permitting the transcriptions to be admitted in evidence and the tapes to be played in the hearing of the jury.

In this case the trial court passed on the question as to the voluntariness of the confession outside the presence of the jury when a request was made for that procedure to be followed, so we do not think there was a violation of *Jackson* v. *Denno, supra.*

But at the hearing to determine the voluntariness of the confession outside the hearing of the jury, the trial court refused to permit Boulden to testify as to the facts and circumstances surrounding the taking of the confession without thereby subjecting himself to cross-examination as to matters pertaining to guilt or innocence, sanity or insanity. In so ruling the trial court followed the holding of this court in *Fikes* v. *State*, 263 Ala. 89, 81 So. 2d 303. Boulden's trial was held before our decision in *Duncan* v. *State, supra.* In the opinion in the case last cited we did not expressly overrule *Fikes* v. *State, supra*, as to that point but we think the opinion has that effect. If this case had been tried after *Duncan* v. *State, supra*, was

decided and if the trial court had followed the procedure which we suggested where a request is made that the trial judge determine the voluntariness of the confession away from the jury, then Boulden would have been permitted to take the stand and testify for the limited purpose of giving his version of the facts and circumstances surrounding the taking of the confession without waiving his right to decline to take the stand in his own defense on the trial in chief or waiving any other right stemming from his choice not to testify.

But we do not think that the ruling of the trial court here under consideration should work a reversal, although the holding in *Fikes* v. *State, supra,* to which we have alluded above and which the trial court, no doubt, considered binding, is no longer to be followed.

Boulden became a witness in his own behalf and testified substantially in accordance with his confession. He did not claim that he had ever been mistreated in any way. He did say, in substance, that on the afternoon of May 1, 1964, at the scene of the crime, Captain Williams told him that some of the policemen did not like what had happened, wanted to do something about it, wanted to kill him, and that the only way Williams could get him out of there alive was for him to confess. But the confession did not come until May 6th and was entirely unconnected with the statement which Boulden says Williams made on May 1st, and cannot be considered as an inducement to the confession.—*State* v. *Jacques,* (R. I.), 76 Atl. 652. If the alleged statement of Williams was the only thing upon which Boulden could rely as an inducement to the confession, and we assume it was, then it is clear that the trial court would not have reached a different conclusion concerning the voluntary character of the confession if Boulden had testified at the hearing held outside the presence of the jury for the purpose of determining that question.

If the holding of the Supreme Court of the United States in *Motes* v. *United States,* 178 U. S. 458, 20 S. Ct. 993, 44 L. Ed. 1150, is still the law, then the conclusion we have reached above will withstand the onslaughts of the federal courts. We say the same about *Wheeler and Patton* v. *United States,* 165 F. 2d 225, *cert. denied, Pat-*

ton v. *United States*, 333 U. S. 830, 68 S. Ct. 448, 92 L. Ed. 1115. Neither of the cases last cited above has been expressly overruled in so far as we are advised, but they may have been overruled *sub silentio* in *Fahy* v. *Connecticut*, 375 U. S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171. We are not certain of the full import of the *Fahy case*, *supra*.

We are familiar with recent decisions of the Supreme Court of the United States which hold, in effect, that if a coerced or compelled confession is introduced at the trial, a judgment of conviction will be set aside even though the evidence, apart from the confession, might have been sufficient to sustain the jury's verdict.—*Lyons* v. *Oklahoma*, 322 U.S. 596, 64 S. Ct. 1208, 88 L. Ed. 1481; *Malinski* v. *New York*, 324 U. S. 401, 65 S. Ct. 781, 89 L. Ed. 1029; *Stroble* v. *California*, 343 U. S. 181, 72 S. Ct. 599, 96 L. Ed. 872. Whether the rule of those cases applies to a judicial confession we do not know. It is our view that we have not said anything that runs counter to that rule. We have found the confession to have been voluntarily made. We are not here saying that error in admitting an involuntary confession was cured by the admissions of Boulden as a witness in his own behalf. We are saying that the record before us supports no reasonable conclusion but that the trial court would have made the same ruling concerning the voluntariness of the confession if Boulden had testified at the hearing held outside the presence of the jury.

We will observe that this court, along with others, has applied the harmless error doctrine to assertions made that the introduction of evidence of confessions should not work a reversal where the defendants had taken the stand and given testimony substantially in the language of the confessions.—*Wheeler and Patton* v. *United States*, *supra*; *Dyer* v. *State*, 241 Ala. 679, 4 So. 2d 311; *Smith* v. *State*, 253 Ala. 220, 43 So. 2d 821; *Hardie* v. *State*, 260 Ala. 75, 68 So. 2d 35; *Commonwealth* v. *McNeil*, (Mass.), 104 N. E. 2d 153; *McKnight* v. *State*, (Miss.), 157 So. 351; *People* v. *Combes*, 14 Cal. Rptr. 4, 363 P. 2d 4; *State* v. *Freeman*, 232 Ore. 267, 374 P. 2d 453; *State* v. *Fauquette*, (Nev.), 221 P. 2d 404. The cases just cited are all death cases. The cases from this and other jurisdictions which

have applied the same rule in non-death cases are legion. However, it may be that those cases have been or will be overturned by the Supreme Court of the United States in keeping with what seems to be a determination to set aside practically all convictions where a confession is involved, particularly where the death sentence is imposed.

The case of *Hamilton* v. *Alabama*, 364 U. S. 931, 81 S. Ct. 388, 5 L. Ed. 2d 364, may be an indication that the Supreme Court of the United States will not permit the application of the harmless error doctrine in a capital case.

Insanity

As excuse for the crime, the burden was on Boulden to prove clearly to the reasonable satisfaction of the jury that he was so afflicted by disease of the brain when the offense was committed as to render him so insane that he did not know right from wrong with respect to the particular offense charged, or by reason of such mental disease he could not resist doing the wrong; and the crime must have been the product solely of such mentally diseased condition.—*Aaron* v. *State*, 271 Ala. 70, 122 So. 2d 360, and cases cited.

The issue, therefore, of insanity as excuse for the crime was for the determination of the jury. This issue was determined adversely to Boulden. We think the verdict was well founded. The testimony offered by Bouldon to support his plea of not guilty by reason of insanity was that of himself and his mother that he had been nervous and was subject to having fainting spells and fits.

Duly mindful of our duty in cases of this character, we have carefully examined the record for any reversible error, whether pressed upon our attention or not. We have here dealt with all questions calling for treatment. We find no reversible error in the record and the cause is due to be affirmed. It is so ordered.

AFFIRMED.

Livingston, C. J., Goodwyn, Merrill, Coleman and Harwood, JJ., concur.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

Civil Action No. 2303-N

BILLY DON FRANKLIN BOULDEN, By and through his parents, Matt Boulden and Susie Boulden, PEITITIONER

vs.

WILLIAM C. HOLMAN, Warden, Kilby Prison, RESPONDENT

ORDER—Dated and Filed August 23, 1966

The petitioner, Billy Don Franklin Boulden, by order of this Court made and entered in this case on November 18, 1965, filed in forma pauperis his application for a writ of habeas corpus. The petitioner is represented by the Honorable William B. Moore, Jr., Attorney at Law, Montgomedy, Alabama, who was appointed by this Court on November 18, 1965, to represent the petitioner in the proceeding and who has represented Boulden in a diligent and commendable manner.

Petitioner Boulden alleges that he is presently incarcerated by the State of Alabama at Kilby Prison, Montgomery, Alabama, in violation of his constitutional rights. His basic contention is that his constitutional rights were violated by the State of Alabama acting through the Circuit Court of Morgan County, Alabama, in state court case No. 5532 during the month of May 1964.[1] The petitioner is awaiting the execution of the sentence of death imposed by the Circuit Court of Morgan County, Alabama.

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[1] The four-count indictment charging petitioner Boulden with the first degress murder of Lloyd C. Hays was returned to the Circuit Court by the Grand Jury on May 7, 1964. The arraignment was held on May 7, 1964, the trial commenced on May 27, 1964, and the verdict of guilty was rendered by the jury on May 29, 1964. Petitioner was sentenced to death by electrocution. The conviction and sentence were affirmed by the Supreme Court of Alabama on September 30, 1965. 179 So. 2d 20.

On the pretrial hearing of this cause, as reflected by the order of this Court made and entered herein on April 6, 1966, and after this Court had entered a formal order staying execution of the sentence until a plenary hearing could be conducted, it was stipulated and agreed that the issue to be inquired into and determined by this Court is whether the reception into evidence of admissions against interest and purported confessions obtained after Boulden's arrest by the State at a time when Boulden was not represented by counsel constituted a denial of his constitutional rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Upon this submission, the Court makes the following findings:

On May 1, 1964, shortly after Lloyd C. Hays was killed, petitioner Boulden was arrested and taken into custody in the vicinity of the alleged crime. Boulden was then taken to the actual scene of the killing and retained there in an Alabama Highway patrol car in the presence of a number of hostile persons. There was no evidence, however, that the protection afforded Boulden on this occasion was inadequate. Thereafter, Boulden was taken to Athens, Limestone County, Alabama, where he was interrogated in the Limestone County Jail by Lt. E. B. Watts, Criminal Investigator, and Captain John Williams of the State Troopers, from approximately ten o'clock that night to twelve-thirty or one o'clock the next morning. At the beginning of the interrogation, Boulden was informed of his constitutional rights with the exception of his right to counsel. During the questioning, Boulden was given food, permitted to smoke, and permitted to use the toilet which adjoined the room where the interrogation took place. Boulden was not mistreated in any way, nor was he threatened or otherwise coerced. The interrogation ended when Boulden admitted that he killed Hays and had signed a written statement prepared by Lt. Watts to that effect. Boulden was then taken to Decatur, Alabama, for photographs and a physical examination. Afterwards, he was returned to a cell at the Limestone County Jail where he was allowed to sleep.

Later that morning (May 2, 1964), at approximately six o'clock, Boulden was brought before the Honorable James N. Bloodworth, one of the judges of the Circuit Court for Morgan County, Alabama, who fully and completely explained to Boulden the scope of his rights under the Constitution of the United States, including his right to counsel. Judge Bloodworth was unaware of Boulden's confession the night before. Boulden's parents—Matt and Susie Boulden—were present, and he was allowed to visit and consult with them. The early time for the hearing and Boulden's prior removal to Limestone County and subsequent removal to Kilby Prison in Montgomery, Alabama, were precautionary measures taken to insure Boulden's safety.

Boulden remained at Kilby Prison for several days, during which time he was treated well and allowed to see his parents, who informed him of their efforts—which were unsuccessful because of their indigency—to hire an attorney. On May 6, 1964, Lt. Watts, Captain Williams, and the Morgan County sheriff, took Boulden back to the scene of the crime. A circle of police had ringed the area in order to prevent intrusion from any onlookers and to insure Boulden's safety. Consistent with his confession in the early morning of May 2, 1964, Boulden re-enacted or demonstrated how he killed Hays. Boulden also signed a second written confession, again prepared by Lt. Watts. Boulden was not advised of his rights on this occasion, nor was he aware of a concealed wireless microphone on the person of Lt. Watts, which transmitted to a tape recorder located in a distant patrol car. There is no credible evidence of any coercion, threats, or attempts to procure from Boulden an admission or confession against his will; nor was he promised leniency at his trial or any other reward for any such statement. A portion of the tape recording and a transcription thereof were admitted into evidence at Boulden's trial over the objection of his counsel.

Upon consideration of the trial record and transcript filed with the Clerk of this Court on January 13, 1966, and received into evidence by stipulation of counsel, and upon consideration of the oral evidence taken upon this

plenary hearing, this Court concludes that the written confessions made by Boulden on May 2, 1964 and on May 6, 1964, the latter having been admitted into evidence over defendant's objection at the trial of this case, did not violate Boulden's constitutional rights as guaranteed by either the Fifth, Sixth or Fourteenth Amendments to the Constitution of the United States.

As an initial observation, this Court wishes to emphasize that it is not called upon in this proceeding to pass on the guilt or innocence of Boulden of the crime for which he was convicted, nor is the Court required to determine the veracity of the confessions made by Boulden. *Rogers* v. *Richmond*, 365 U.S. 534 (1961). It should also be observed that the cases of *Miranda* v. *State of Arizona*, 384 U.S. 436 (1966), and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), are not to be applied retroactively. *Davis* v. *North Carolina*, —— U.S. —— (June 20, 1966); *Johnson* v. *New Jersey*, —— U.S. —— (June 20, 1966). This Court notes that *Escobedo* affects only those cases in which the trial began after June 22, 1964, the date of that decision, and that *Miranda* applies only to cases in which the trial began after the date of that decision, which was June 13, 1966. The conviction in this case was obtained and trial completed before either the *Miranda* or *Escobedo* case was decided. The rulings in those cases are therefore inapplicable to the present proceeding. However, as the Supreme Court noted and emphasized in *Davis* v. *North Carolina*, *supra*, the review of voluntariness in cases in which the trial was held prior to *Escobedo* and *Miranda* is not limited in any manner by those decisions.[2] As the Supreme Court noted in the *Davis* case:

> As we pointed out in *Johnson*, however, the nonretroactivity of the decision in *Miranda* does not affect the duty of courts to consider claims that a statement was taken in circumstances which violate the standards of voluntariness which had begun to

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[2] See also *Wainwright* v. *Padgett* (5th Cir., July 8, 1966), —— F. 2d ——; *Lyles* v. *Beto* (5th Cir., July 13, 1966), —— F. 2d ——; *Gamble* v. *Beto* (5th Cir., July 14, 1966), —— F. 2d ——; *Marion* v. *Harrist* (5th Cir., July 18, 1966), —— F. 2d ——, and *State* v. *Washington* (5th Cir., August 1966), —— F. 2d ——.

> evolve long prior to our decisions in *Miranda* and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) . . . . The standard of voluntariness which has evolved in state cases under the Due Process Clause of the Fourteenth Amendment is the same general standard which applied in federal prosecutions—a standard grounded in the policies of the privilege against self-incrimination. *Malloy* v. *Hogan*, 378 U.S. 1.

Thus, the sole issue which remains for consideration is whether the confessions were voluntarily given by Boulden.

Petitioner relies, in part, on the case of *Davis* v. *North Carolina*, *supra*, the most recent of the Supreme Court's pronouncements in the area of coerced confessions. In *Davis*, the defendant, a Negro with no more than a fourth-grade education, was held by the police for a period of 16 days, during which State authorities were the only persons who saw him; he was questioned constantly in an atmosphere which the Court found to be generally "coercive," and was led on a 14-mile trek to the scene of the crime, and avowed purpose of which was "to break down his [defendant's] alibis to the crime of murder." These facts are in sharp contrast to those in the present case. As stated previously, on May 1, 1964, petitioner Boulden was interrogated only briefly, prior to which he was informed that he had a right to remain silent and that any statement which me might make could be used against him. The investigating officers were courteous, and Boulden was allowed to eat, to smoke, and to use toilet facilities when he desired—conditions which scarcely compare with those in *Davis*. Although it is true that Boulden was not on this occasion informed of his right to counsel, "a failure to warn accused persons of their rights, or the failure to give them outside assistance" is but one of many factors to be considered upon the question of voluntariness[3] and does not of itself render defective an otherwise valid confession. See *Crooker* v. *California*, 357 U.S. 433 (1958); *Taylor* v. *Holman*, —— F. Supp —— (August

[3] *Johnson, et al.* v. *State of New Jersey*, —— U.S. —— (June 20, 1966); *Marion* v. *Harrist* (5th Cir., July 18, 1966), —— F. 2d ——.

26, 1966). Accordingly, this Court concludes that the State did not transgress the prevailing standards safeguarding Boulden's right to remain silent in procuring this first confession in the early morning of May 2, 1964. Nor were those standards violated when the second confession was obtained on May 6, 1964. By this time Boulden had been fully apprised of his constitutional rights, including his right to counsel, although there was no request for counsel until May 7, 1964, at which time—and before arraignment—counsel was immediately appointed. Once again, the atmosphere was not sufficiently hostile or coercive to such an extent that this Court can conclude that Boulden's will was overborne. This confession, like the first, simply was not coerced.

Counsel for petitioner also relies on the testimony of Boulden's high school principal, I. F. Stallworth, and a clinical psychologist, Dr. Arnold Hamby. Principal Stallworth testified that Boulden was below average in school and that his grade level was between grades five and six at the time of, or shortly before, the killing. This testimony is in part discounted by the fact that Boulden was continually absent from class, and the somewhat contradictory statement of the principal that Boulden had the ability of an average student. The essence of Dr. Hamby's testimony was that Boulden had a "dull-normal" intelligence quotient (83), and that he was more inclined than ordinary individuals to follow almost any suggestion from one in authority if he thought it would help him extricate himself from a situation of stress. This Court, however, is not satisfied that this condition (which is by no means uncommon) would lead an individual to confess to an obviously serious offense, rather than try to fabricate an excuse or alibi. Even assuming, however, that Boulden was, to a certain extent, susceptible to coercion, the circumstances surrounding both confessions do not reflect that such coercion existed, or that his will was in fact overpowered, or that his confessions were other than voluntarily made. It must, therefore, be concluded that Boulden's confessions, which were, in part, evidence at his trial, were free from constitutional defect.[4]

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[4] While a Court upon a habeas corpus proceeding such as this one is not concerned with guilt or innocence, *Rogers* v. *Richmond*,

In consideration of the foregoing, it is the ORDER, JUDGEMENT and DECREE of this Court that the petition for a writ of habeas corpus, filed herein by leave of this Court in forma pauperis by petitioner Boulden, be and the same is hereby denied. It is further ORDERED that petitioner Boulden's application for a writ of habeas corpus be and the same is hereby dismissed.

It is the further ORDER, JUDGMENT and DECREE of this Court that the petitioner, Billy Don Franklin Boulden, be and he is hereby remanded to the custody of the State of Alabama.

Done, this the 23rd day of August, 1966.

/s/ Frank M. Johnson, Jr.
Chief Judge

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365 U.S. 534, and while this Court fully recognizes that had either of the confessions been illegally—in a constitutional sense—obtained and then offered and admitted into evidence upon the trial, any subsequent conduct on the part of the defendant—even to the point of testifying and admitting the crime—would not cure the constitutional defect, *Fahy* v. *Connecticut*, 375 U.S. 85, it is interesting to note that Boulden took the witness stand during the trial of this case in the State Circuit Court and testified to almost exactly the same facts to which he had confessed.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 24174

BILLY DON FRANKLIN BOULDEN, APPELLANT

versus

WILLIAM C. HOLMAN, Warden, Kilby Prison, Montgomery, Alabama, APPELLEE

Appeal from the United States District Court for the Middle District of Alabama

OPINION—November 3, 1967

Before COLEMAN and AINSWORTH, Circuit Judges, and CARSWELL, District Judge.

CARSWELL, District Judge: Appellant, under sentence of death following conviction for murder and after affirmance on appeal by the Supreme Court of Alabama,[1] sought relief by petition for writ of habeas corpus with the district court.

It was there stipulated and agreed that the issue to be determined was whether the reception into evidence of admissions against interest and purported confessions obtained after appellant's arrest at a time he was not represented by counsel constituted a denial of his constitutional rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments.

After plenary hearing, at which appellant was represented by counsel, the district court entered full and detailed findings.

The evidence adduced at the hearing, which included the trial record and transcript, adequately supports the findings, and we find no error in the district court's denial of the writ and, accordingly, affirm.

Before recounting portions of the significant findings of the district court it is noted that Boulden's conviction was

[1] 179 So. 2d 20 (1965).

obtained and trial completed prior to the effective date of both *Miranda* v. *Arizona*, 384 U. S. 486 (1966), and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). The rulings in each of these landmark cases are not to be applied retroactively and are therefore inapplicable here. *Johnson* v. *New Jersey*, 384 U. S. 719 (1966).

It is correctly urged, however, by counsel for appellant here that while *Escobedo* and *Miranda* set new safeguards against the use of unreliable statements at trial, their retroactivity does not preclude defendants in criminal cases, like Boulden here, whose trials were already completed, "from invoking the same safeguards as part of an involuntariness claim." Id. at 730.

The Supreme Court has emphasized in *Davis* v. *North Carolina*, 384 U. S. 737 (1966) that the review of voluntariness in cases in which the trial was held prior to *Escobedo* and *Miranda* is not limited in any manner by those decisions, saying there at page 740:[2]

> "As we pointed out in *Johnson*, however, the nonretroactivity of the decision in *Miranda* does not affect the duty of courts to consider claims that a statement was taken in circumstances which violate the standards of voluntariness which had begun to evolve long prior to our decisions in *Miranda* and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). . . . The standard of voluntariness which has evolved in state cases under the Due Process Clause of the Fourteenth Amendment is the same general standard which applied in federal prosecutions—a standard grounded in the policies of the privilege against self-incrimination. *Malloy* v. *Hogan*, 378 U. S. 1, 6-8 (1964)."

With this most recent pronouncement by the Supreme Court in this area of coerced confessions borne in mind we have carefully reviewed the full record here.

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[2] *Texas* v. *Graves*, 380 F. 2d 676 (5th Cir. 1967). See also *Wainwright* v. *Padgett*, 363 F. 2d 822 (5th Cir. 1966); *Lyles* v. *Beto*, 363 F. 2d 503 (5th Cir. 1966); *Gamble* v. *Beto*, 363 F. 2d 831 (5th Cir. 1966); *Marion* v. *Harrist*, 363 F. 2d 139 (5th Cir. 1966).

Both appellant and appellee agree that the totality of the circumstance surrounding and leading to the confession and admissions must be considered in determining the crucial issue of voluntariness. This requires a rather dealed statement of the factual findings on this record.

On the afternoon of May 1, 1964, appellant, a negro male, 18 years of age, had sexual intercourse with a 15 year old white married female. The testimony of the parties at the trial is in conflict as to whether the act was voluntary or involuntary. As the parties walked down a wooded lane they were confronted by Lloyd C. Hays, a conservation officer for the State of Alabama. A scene ensued in which Hays was shot, struck with a knife and ultimately killed. Appellant was arrested and taken into custody in the vicinity of the alleged crime. He was then taken to the scene of the killing and retained there in a patrol car in the presence of a number of hostile persons. There was no evidence, however, that the protection afforded appellant on this occasion was inadequate.

Appellant was then taken to the Limestone County Jail in Athens, Alabama, where he was interrogated by Lt. E. B. Watts, Criminal Investigator, and Captain John Williams of the State Troopers, from approximately ten o'clock that night until twelve-thirty or one o'clock the next morning. This interrogation was recorded on a wire recorder, hidden on the person of Lt. Watts. Lt. Watts testified that appellant was advised of his right not to make a statement, and that any statement made might be used against him. Appellant testified that he inquired whether he was supposed to have a lawyer, and that he was told that he would not get one until he talked. The transcription of this recorded interrogation reveals that Captain Williams initially made the following statement to appellant: "Nobody has threatened you or anything, we haven't offered you anything to get you to talk to us. . . ."

A confession written in longhand by Lt. Watts was then signed by appellant. The second confession was, in effect, a condensation of the recorded testimony. The first paragraph of the signed confession is as follows:

> "I Billy Don Franklin . . . wish to make the following voluntary statement to E. B. Watts. I have

> not been threatened in no way offered no [sic] reward nor hope of reward to get me to make a statement. I have been told by Mr. Watts that any statement I make can be used against me in a court of law."

Appellant was not informed of his right to counsel.

During the questioning appellant was given food, permitted to smoke, and permitted to use the toilet which adjoined the room where the interrogation took place. The district court found that he was not mistreated in any way, nor was he threatened or otherwise coerced. Appellant testified that he was threatened by Captain Williams. The interrogation ended when appellant admitted that he killed Hays and signed the written confession to that effect. At about 8:30 P.M. on May 1 the father of appellant went to the jail in Decatur in an attempt to see appellant. The jailer denied this request. Appellant was then taken to Decatur, Alabama, for photographs and a physical examination.

At six o'clock on the morning of May 2, 1964, appellant was brought before Judge James N. Bloodworth, of the Circuit Court for Morgan County. Appellant's mother, father and several other members of his family were present. Judge Bloodworth told those present that the purpose of the hearing was to explain the nature of the charges and to inform the accused of his constitutional rights. The appellant, in the presence of his family, was advised of the following: the pending charges, the right to a preliminary hearing and the nature of such a hearing, the possible penalty if convicted, the right to remain silent, the right to grand jury indictment and trial, the right to counsel and appointment of counsel if indigent. At the conclusion of the hearing appellant consulted with his family, and was then taken to Kilby Prison in Montgomery.

Judge Bloodworth was unaware of the appellant's confessions the night before. The early time for the hearing and appellant's subsequent removal to Kilby Prison in Montgomery were precautionary measures taken to insure appellant's safety.

Appellant remained at Kilby Prison for several days, during which time he was allowed to see his parents. They informed him of their efforts—which were unsuccessful because of their indigency—to hire an attorney. On May 6, 1964, Lt. Watts, Captain Williams, Sheriff McRae and Deputy Fire Marshal Dees took appellant back to the scene of the crime. A circle of police had ringed the area in order to prevent intrusion and to insure appellant's safety. Consistent with his confession in the early morning of May 2, 1964, appellant re-enacted how he killed Hays. Appellant was not again advised of his rights on this occasion, nor was he informed of a concealed wireless microphone on the person of Lt. Watts. The district court found no credible evidence of any coercion, threat, or attempt to procure from appellant an admission or confession against his will. There is no evidence that he was promised a reward or leniency for any statement. A portion of the tape recording and a transcription thereof were admitted into evidence at appellant's trial over the objection of his counsel.

On May 7, 1964, the Circuit Judge appointed counsel to represent the accused.

At the district court hearing Dr. Ronald Hamby, a psychologist, testified that appellant's I.Q. was 83 which was categorized as "dull normal." He further testified that appellant suffered from an anxiety complex, and that he was susceptible to coercion.

The appellant places heavy reliance on *Davis* v. *North Carolina*, *supra*, where the circumstances surrounding the confession and prolonged interrogation there were found to be generally "coercive" and the actions of state authorities had the avowed purpose of breaking down the defendant's alibis to the crime of murder. In *Davis* the defendant was held by police for a period of 16 days, during which time the only persons who saw him were state authorities.

We agree with the district court that the facts in *Davis* are in sharp contrast to those in the present case. Boulden was interrogated on the day of his arrest only briefly and before this time he had been told that he had a right to remain silent and that any statement which he might

make could be used against him. Unlike the facts in *Davis*, Boulden was treated courteously and allowed to eat, smoke and to use toilet facilities when he desired. Even under the expressly noncontrolling but more explicit teachings of *Escobedo* and *Miranda* the sole flaw in the total situation here was the failure to inform Boulden of his right of counsel. It is clear, however, that "a failure to warn accused persons of their rights, or the failure to give them outside assistance" is but one of many factors to be considered upon the question of voluntariness,[3] and does not itself render defective an otherwise valid confession. Under the applicable standards, therefore, we conclude that Alabama authorities did not transgress Boulden's right to remain silent in procuring this first confession early on May 2, 1964.

We agree with the district court also that those standards were not violated when the second confession was obtained on May 6, 1964. By then Boulden had been fully and most carefully informed by Judge Bloodworth of his constitutional rights, including specifically his right to counsel. This was done approximately 13 hours after arrest and four days prior to the third confession. He did not request counsel until the following day at which time—and before arraignment—counsel was immediately appointed.

It is to be expected that a review of various court decisions on voluntariness, especially those, like this one, which are governed by pre-Escobedo-Miranda standards and the totality of circumstances, should focus on various criteria as determinative.

In *Brown* v. *United States*, 356 F. 2d 230 (10th Cir. 1966), the criteria found to be relevant were the following: age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment; and the threat of mistreatment or inducement.

To this may be added lack of information respecting right of counsel and under such of these a myriad of factual situations. One situation alone may under special

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[3] *Johnson, et al.* v. *State of New Jersey*, 384 U.S. 719 (1966); *Marion* v. *Harrist*, 363 F. 2d 139 (5th Cir. 1966).

factual conditions be sufficient to be controlling. Moreover, if negligent or wilful disregard for the accused's rights are present cumulatively, a finding of coercion is required, as in *Davis*, which is abhorrent to the constitutional guarantee of right of silence. Whatever the factual circumstances, the essential point for determination is whether the accused's will was overborne, thus violating his constitutional right to remain silent.

This we think has always been implicit in our law. *Escobedo* and *Miranda* have made explicit certain specific requirements, thus, hopefully at least, reducing the area where coercion of accused persons is likely to occur. A will overborne, a mind subjugated or enticed, is just as coerced, and thereby constitutionally protected before and after *Escobedo-Miranda*.

It is noted that only a portion of the tape and transcript of the *last* confession was actually received in evidence in appellant's trial. This, as noted before, was obtained after Boulden had been carefully informed of his constitutional rights, including right of counsel. The earlier statements, made after advice with respect to silence but before advice with respect to counsel, were not offered or received in evidence at trial. Appellant urges that the confession actually received in evidence, however, was the end product of the earlier and more constitutionally suspect confession; that the accused was then acutely aware that he had earlier made admissions against his interest and was, therefore, merely repeating his ostensibly uneraseable words of confession. *Culombe* v. *Connecticut*, 367 U.S. 568 (1961), is cited as authority for this contention.[4] To the extent that *Culombe* requires that the

[4] We agree with the district court's observation: "While a Court upon a habeas corpus proceeding such as this one is not concerned with guilt or innocence, *Rogers* v. *Richmond*, 365 U.S. 534, and while this Court fully recognized that had either of the confessions been illegally—in a constitutional sense—obtained and then offered and admitted into evidence upon the trial, any subsequent conduct on the part of the defendant—even to the point of testifying and admitting the crime—would not cure the constitutional defect, *Fahy* v. *Connecticut*, 376 U.S. 85, it is interesting to note that Boulden took the witness stand during the trial of this case in the State Circuit Court and testified to almost exactly the same facts to which he had confessed."

totality of circumstances standard of determining voluntariness includes consideration of *all* confessions and incriminating statements attributed to the accused we agree with this contention. And this is precisely what was done by the district court with thoroughness and care, and also what we have sought to do here.

Each of appellant's statements, his actions, and facts respecting his physical and mental condition, and environment from the moment of his arrest to the end of the last interrogation are essential fragments or facets for consideration on the issue of voluntariness, but we find from the record here no plausible suggestion that Boulden's will was overborne on the occasion of the last confession by having made earlier ones. It is noted that all of his statements were consistent, and while they were made at different points in time and place there were no ominous overtones of coercion with respect to any of them which would require as a matter of law a finding of involuntariness.

Finally, we have also carefully considered the evidence with respect to Boulden's age and mental capacity. There is simply no evidence that Boulden's condition in this regard was particularly remarkable or even unusual. We cannot say that the district court was in error in concluding that he was neither mentally or physically unable to make a free and voluntary confession and admission against interest at any of the critical times.[5]

We cannot say that the record shows a coerced confession as a matter of law nor can we say that the findings and conclusions of the district court are clearly erroneous. See *Smith* v. *Heard*, 315 F. 2d 692 (5th Cir. 1963). The judgment appealed from is, therefore,

AFFIRMED.

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[5] This is indeed made the thesis of Justice Frankfurter's opinion in *Culombe*, supra, where he reviews the historical background of the fundamental tenet of our law respecting self-incrimination.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1966

No. 24174

D. C. Docket No. CA 2303-N

BILLY DON FRANKLIN BOULDEN, APPELLANT

versus

WILLIAM C. HOLMAN, Warden, Kilby Prison, Montgomery, Alabama, APPELLEE

Appeal from the United States District Court for the Middle District of Alabama

Before COLEMAN and AINSWORTH, Circuit Judges, and CARSWELL, District Judge.

JUDGMENT—November 3, 1967

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued as Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 24174

BILLY DON FRANKLIN BOULDEN, APPELLANT

versus

WILLIAM C. HOLMAN, Warden, Kilby Prison,
APPELLEE

PETITION FOR REHEARING AND HEARING EN BANC—
Served November 23, 1967

The Appellant, Billy Don Franklin Boulden, respectfully petitions this Honorable Court for a rehearing of the appeal in the above entitled cause and that said hearing be en banc and in support of this petition represents to the Court as follows:

The opinion rendered by this Honorable Court dated November 3, 1967 did not correctly apply the Totality of Circumstances Doctrine in determining Appellant's rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. For the foregoing reason a rehearing and a hearing en banc should be granted.

/s/ William B. Moore, Jr.
Attorney for Appellant
Billy Don Franklin Boulden

1201 Bell Building
Montgomery, Alabama

STATE OF ALABAMA
MONTGOMERY COUNTY

William B. Moore, Jr., being duly sworn, on oath certifies and says: That he is the attorney for appellant in this cause; that he makes this certificate in compliance with

Rule 29 of the Rules of this Court; that in his judgment the within and foregoing Petition for rehearing and hearing in banc is well founded and is not interposed for delay.

/s/ William B. Moore, Jr.
WILLIAM B. MOORE, JR.

Sworn and subscribed before me this 22 day of November, 1967.

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24174

BILLY DON FRANKLIN BOULDEN, APPELLANT

versus

WILLIAM C. HOLMAN, Warden, Kilby Prison, Montgomery, Alabama, APPELLEE

Appeal from the United States District Court for the Middle District of Alabama

ON PETITION FOR REHEARING EN BANC—April 30, 1968

Before COLEMAN and AINSWORTH, Circuit Judges, and CARSWELL, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, Rule 25(a), Subpars. (a) (b), the Petition for Rehearing En Banc is also DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24174

BILLY DON FRANKLIN BOULDEN, APPELLANT

versus

WILLIAM C. HOLMAN, Warden, Kilby Prison, Montgomery, Alabama, APPELLEE

Appeal from the United States District Court for the Middle District of Alabama

AMENDED ORDER ON PETITION FOR REHEARING EN BANC —June 24, 1968

Before BROWN, Chief Judge, TUTTLE, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON and CLAYTON, Circuit Judges.

BY THE COURT: A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the Judges in active service having voted against granting a rehearing en banc,

IT IS ORDERED that the cause shall not be reheard by the Court en banc.

Judge Tuttle, with whom the Chief Judge concurs, dissenting.

TUTTLE, Circuit Judge, with whom the Chief Judge Concurs, dissenting:

I DISSENT from the denial of the petition for rehearing en banc. It is clear that there was an illegal interrogation and inculpatory statement obtained from this prisoner immediately following the shooting and it is clear

beyond doubt that in the eliciting of the confession subsequently admitted by the State Court as a valid confession, much stress was placed by the officers on the fact that Boulden had already confessed under the circumstances which I find completely impermissible. These circumstances include the holding of the accused in a police car at the scene of the crime with a very substantial gathering of people in a threatening mood in and about the car and the confrontation of the accused by a statement of an eye witness that he was the man who was guilty, at which time he made inculpatory statements, although attempting to defend himself on the ground of self-defense. Also, the refusal of the custodial officers to permit his parents to visit him before he gave the second confession bring the case very close to the circumstances announced in the recent Supreme Court decision in *Darwin* v. *Connecticut*, 794 Misc., 36 Law Week, 3441. However, my principal reason for feeling that the conviction should be set aside for a new trial is that assigned by Mr. Justice Harlan in his concurrence. Here, it is clear beyond doubt that what has been held to be a legal confession was obtained by the officers repeatedly calling the accused's attention to the fact that he had already made sufficiently damaging statements and that they merely wanted him to fill in the details.

SUPREME COURT OF THE UNITED STATES

No. 560 Misc., October Term 1968

BILLY DON FRANKLIN BOULDEN, PETITIONER

v.

WILLIAM C. HOLMAN, Warden

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—October 14, 1968

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 644 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 316557 337

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 644

BILLY DON FRANKLIN BOULDEN,

Petitioner,

vs.

WILLIAM C. HOLMAN, Warden, Kilby Prison, Montgomery, Alabama,

Respondent.

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 644

BILLY DON FRANKLIN BOULDEN,

Petitioner,

vs.

WILLIAM C. HOLMAN, Warden, Kilby Prison, Montgomery, Alabama,

Respondent.

BRIEF FOR THE PETITIONER

Opinions Below

This case was appealed to the Circuit Court of Appeals for the Fifth Circuit and is reported as *Boulden* v. *Holman*, 385 F. 2d 102. The Court's order was amended on June 24, 1968 (A. 124). The order of the District Court is unreported but is printed in the record (A. 106).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on November 3, 1967 (A. 113). The amended order of the Court of Appeals was entered on June 24, 1968 (A. 124). A Petition for Writ of Certiorari was filed on July 19, 1968 and was granted on October 14, 1968. The jurisdiction of the Court rests on 28 U. S. C. §1254 (1).

Statutes, Constitutional Amendments and Rules Involved

The *Fifth Amendment to the Constitution of the United States* is involved:

"Rights of Accused in Criminal Proceedings

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The *Sixth Amendment to the Constitution of the United States* is involved:

"Right to Speedy Trial, Witnesses, etc.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 1 of the Fourteenth Amendment of the Constitution of the United States is involved:

"Citizenship Rights not to Be Abridged by States

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

1. Were Boulden's (Petitioner) purported confessions, made on May 1, May 2, and May 6, 1964, voluntarily made in accordance with the standards of due process of the Fourteenth Amendment to the Constitution of the United States?

2. Were Boulden's (Petitioner) purported confessions, made on May 1, May 2, and May 6, 1964, in violation of the Fifth Amendment to the Constitution of the United States?

3. Was the reception in evidence of admission against interest and purported confessions obtained by police officers when Boulden was not represented by counsel and when he had not knowingly or intelligently waived the assistance of counsel, a violation of the Sixth and Fourteenth Amendments to the Constitution of the United States?

4. Were Boulden's (petitioner) constitutional rights violated when each prospective juryman who indicated that he was opposed to capital punishment or had a fixed opinion against it was excused from the venire?

(The basis for raising this question is *Witherspoon* v. *Illinois*, —— US ——, 20 L. ed 2d 776, 88 S. Ct. ——, which was decided by this Honorable Court on June 3, 1968. Petitioner gave Notice of Appeal to the U. S. Court of Appeals on September 13, 1966.)

Statement

Petitioner was convicted of first degree murder, condemned to die in the electric chair and is currently awaiting execution in Kilby Prison at Montgomery, Alabama. This case was appealed to the Supreme Court of Alabama and the conviction was upheld. Petitioner sought Executive Clemency to no avail (A. 82), then his parents filed a writ of habeas corpus in the United States District Court, Middle District of Alabama. That court denied the relief sought and an appeal was taken to the United States Court of Appeals for the Fifth Circuit, which denied relief.

On the afternoon of May 1, 1964, Billy Don Franklin Boulden, a negro male, 18 years of age, had sexual intercourse with Ann Burnett, a 15 year old white, married female. She took her clothes off and submitted on two occasions and Boulden used contraceptives during both acts of intercourse (A. 25). After the first act, the parties sat around and talked and then engaged in the act again, then started back out of the woods. As they walked down a wooded lane they were confronted by Lloyd C. Hays, a conservation officer for the State of Alabama. Neither

party had any knowledge that anyone else was in the area and this confrontation was a complete surprise. Upon seeing Officer Hays, Ann Burnett ran behind him and indicated that she had submitted against her will. Confusion followed and Hays was shot and stuck with a knife and was later found dead some fifty-five feet from the point where he was shot. After they were stopped by Hays and prior to the shooting and sticking Boulden had told Ann Burnett to run, and she did, hence she was not an eye witness when Hays met his death. She ran to a nearby highway and talked with a Deputy Sheriff and a State Trooper. They entered the area and a short time later apprehended Boulden.

The uncontested facts of record show that the patrolman who first apprehended Boulden told Boulden to run "because he had been wanting to kill a nigger a long time" (A. 32) and before he told him to run "he throwed the rifle up like he was getting ready to shoot there". The same officer asked Boulden his age and when Boulden told him, he told Boulden he "was old enough to die" (A. 34).

A large number of State Troopers and other peace officers converged on the scene and a number of the residents of the Flint Community began to assemble on the roadway nearby. Captain John Williams and Lt. E. B. Watts, State Troopers, who secured the alleged confessions were among those who arrived at the scene. Williams was the senior man present and took charge. He placed Boulden in his car and Williams stated that Boulden told him that "he didn't do it" (A. 41). Williams also told Watts that Boulden told him at first that "he did not commit this crime" (A. 46).

Boulden testified, "I told Captain Williams I didn't do it and he told me that I did. After that, I said—start back telling him about the two guys that was there, and he told me I was lying again. And he got mad and started cussing" (A. 33). (Boulden contended that two men, unknown to him, appeared on the scene and killed Hays.)

"Well he (Williams) called me a little bastard and a few more names, told me I didn't have no business down there with that girl, and that was about it. Then he told me about if I didn't confess, that the officers that was wanting to kill me, he wasn't going to stop them" .(A. 34).

Boulden told Captain Williams, "Well, I told him if he would get me out of there and wouldn't let them bother me, I would confess" (A. 34). On the way out Boulden saw a "large crowd of people" from the Flint Community. The Sheriff had a car in front and one behind the car conveying Boulden and had ordered the car in front to stay in front until the entourage crossed the Decatur Bridge.

The County Seat of Morgan County, the place where the killing took place, is Decatur, Alabama, but the Sheriff took Boulden and put him in a jail in the adjoining county in Athens, Alabama. When, in the jail, he was stripped of socks and shoes, shorts, short shirt, and pants, and given only a pair of coveralls (A. 35). The coveralls were his only item of clothing and he was not given any shoes from the time he arrived until after the first two confessions were obtained.

Captain Williams and Lt. Watts interrogated Boulden in the Limestone County Jail in Athens, Alabama beginning at about 10:30 or 11:00 o'clock on the night of May 1, 1964. Watts had a wire recorder hidden on his person on which

he recorded the first confession. However, Watts seems to differentiate a verbal confession from a written confession in that he stated: "What transpired between eleven and eleven fifty was getting acquainted with the defendant, informing him of his—some of his rights and talking to him in general about this crime" (A. 47). Watts testified that he did not talk with Boulden prior to turning on his recording machine (A. 49). Watts was asked:

> "As I understand it, you had no conversation with this petitioner, this prisoner, did not warn him of any rights or had no conversation at all with him prior to the starting of this tape?
> "A. That is correct." (A. 49)

This interview contained a confession that was transcribed by petitioner's attorney (A. 57). If Watts did not talk to Boulden until he turned on his machine then all of Watts' and Williams' warnings as to Boulden's constitutional rights should appear in the recording. We find the following on page 57 of the Appendix:

> "Q. Nobody has threatened you or anything, we haven't offered you anything to get you to talk to us? You know—you remember me, Cpt. John Williams, Highway Patrol, that talked to you today out there today in my car, you remember me?
>
> A. Yassuh.
>
> Q. Now this is Lt. Watts, E. B. Watts, he is a State Investigator for the State of Alabama. In other words he works for our same department but he is in plain clothes where I wear a uniform.
>
> A. Yessir, I understand.
>
> • • • • •

"Q. Billy now you understand what we doing, we just want to talk to you, want you to tell us the truth about everything that happened today. Now you know you talked with me today in the car and I just want you to repeat it all for Lt. Watts here, just tell us the truth about what happened today.

A. Well—

Q. Now talk up where he can hear you cause he don't hear too good so talk up so he can hear you."

On page 81 of the Appendix:

"Q. Well let's get it written down and we'll be sure and have it right, then read it back and then tell us if it's right or wrong. This is much better than trying to remember say, a week or two, or a month or two after it happened.

A. Yes, sir, yall ready told me."

Boulden then signed a confession prepared by Lt. Watts shortly thereafter. It begins with a perfunctory:

"I, Billy Don Franklin Boulden CM, DOB 8-3-45 address Falkville 2, Alabama wish to make the following voluntary statement to E. B. Watts I have not been threatened in no way offer no reward nor hope of reward to get me to make a statement. I have been told by Mr. Watts that any statement I make can be used against me in a court of law." (A. 51)

It is obvious from an examinaiton of the oral confession and a copy of the written confession that Boulden was never advised that he had a right to remain silent. He certainly was never offered a lawyer.

It is of more than passing interest to note that when Watts talked with Boulden "in general about this crime"

he talked in an earthy manner using colloquial and Anglo-Saxon four letter words which he apparently felt would be more readily understood by his prisoner and he led him and suggested answers when needed. The signed statement does not have any of this in it but appears to be more the words of the State Trooper than that of the petitioner.

Boulden was a slight built boy weighing about 125–130 pounds who had a bad knee which was held together with a steel pin (A. 35) and who had a history of "spells and headaches". When asked if he had a headache or had trouble he answered, "Well, I had—my head had been hurting for about—I don't know, right after—see, it was about three or four months it had been hurting, on and off, but the night before in Athens over there it started worse, and I asked for some aspirin, but I couldn't get any." (A. 38)

Dr. Ronald Hamby, a psychologist of Montgomery, Alabama tested Boulden and determined that his IQ was about 83 which is dull-normal. He further testified that Boulden suffered from an anxiety complex and that he was susceptible to coercion. He was asked the question:

> "Q. In your opinion, if this man were faced with what he thought was a life or death situation and was offered what he thought was an out, even though temporary, what would be his reaction?
>
> A. He would take it.
>
> Q. Would this include doing or saying whatever he thought someone else wanted to hear that he thought was in a position to help him?
>
> A. Yes, sir, could I qualify that?
>
> Q. Yes, sir?
>
> A. He would do this because he is more concerned with immediate danger than he is a danger ten minutes

from now or tomorrow or next year; it's the immediate danger to himself that he is organized to escape from." (A. 29-30)

On the morning of May 2, 1964 after the written confession was obtained, Boulden was carried before Judge Bloodworth in Morgan County at 6:00 A. M. The Courtroom was very heavily guarded. There was much conversation about "mob violence". The Judge's academic lecture on the prisoner's rights included advising him that he had a right to a preliminary hearing (A. 6). This hearing was never had. He was advised he had a right to bond. Bond was never determined. The Judge advised him he had a right to a lawyer but stated that he "hasn't lost any right by not having a lawyer present" (A. 7).

Boulden had already made two confessions which would hardly have happened had he had a lawyer.

Four days later on May 6, 1964, Williams, Watts, Sheriff McRae and Deputy Fire Marshal Howard Dees came to Kilby, picked up Boulden and took him back to the scene of the murder and led Boulden through a reenactment and confession which again was taken down on concealed electronic equipment. No one ever told Boulden on that occasion that he had a right to remain silent or that he had any constitutional rights. The area was sealed off by armed men and Boulden was very much aware that he had been returned to the scene where Judge Bloodworth had inferred that mob violence could occur. Lt. Watts was carrying a concealed transmitter, and did most of the interrogating. A combination receiver and tape recorder was being operated by the prosecuting District Attorney while seated inconspicuously away from the scene. He recorded the in-

terrogation while Lt. Watts asked leading questions and converted the inadequate reply of Boulden's "I don't know" of May 1, to substantial statements of fact that would help to get a conviction. A transcript of the May 6, recordings, over the violent objection of Boulden's attorney, was read to the jury as Exhibits 29 and 30 (A. 10). Then just before the State rested its case the Solicitor made sure that the involuntary confession of Boulden was in the mind of the jury; the tape recording was played by Lt. Watts (A. 26-28) for the jury. Defense counsel objected—fruitlessly.

The Court asked each group of prospective jurors if they had a fixed opinion against capital or penitentiary punishment and the following jurors indicated that they did not believe in capital punishment and were promptly excused by the Court:

Redus C. Collier
Bradford W. Mixon
Fritz G. Holmes
Claude Patton
Elymus G. Riley
Neal Simpson
John L. Nelson
Jessie Simmons
Ray Mitchell
U. M. Rush
E. O. Moon
Henry H. Seibert
Arvle Coury
Fred E. Vickers
Hutchell Latham, Jr.
Ossie Leeth

Summary of Argument

1. Two illegal confessions were taken from petitioner on the night of May 1 and in the early morning hours of May 2, 1964. Petitioner was not advised of his constitutional rights and did not waive said rights.

2. All prospective jurors in petitioner's case who indicated that they were opposed to capital punishment or that they did not believe in it or who had a fixed opinion against it were excused for cause. Thus, petitioner was tried by a "hanging jury" and his constitutional rights were violated.

ARGUMENT

I.

Two Illegal Confessions Were Obtained From Petitioner on the Night of May 1, 1964 and Early Morning Hours of May 2, 1964 by Two State Troopers.

Petitioner's rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States as to confessions and appointment of counsel in criminal cases in State Court were violated.

A realistic appraisal of the circumstances in each case must be made to determine whether or not a confession was the product of coercion.

In *Beecher* v. *Alabama*, 19 L. ed 2d 35, 280 Ala. 283, 193 So. 2d 505 the Court stated:

> "But constitutional inquiry into the issue of voluntariness 'requires more than a mere colormatching of

cases' *Reck* v. *Pate,* 367 U. S. 433, 442, 6 L. ed 2d 948, 954, 81 S. Ct. 1541."

The right of a person to remain silent unless he chooses to speak is the unfettered exercise of his own will. In *Reck* the Court said:

> "But it is hardly necessary to state that the question whether a confession was extracted by coercion does not depend simply upon whether the police resorted to the crude tactics of deliberate physical abuse. The blood of the accused is not the only hallmark of an unconstitutional inquisition."

As in *Reck,* Boulden had no prior criminal record or experience with the police. Also, as in *Reck* Boulden's family was kept from him until after he had confessed.

The threat of mob violence was apparent as in *Payne* v. *Arkansas,* 356 U. S. 560, 2 L. ed 975, 78 S. St. 844.

Boulden was never advised of his right to remain silent as in *Haynes* v. *State of Washington,* 373 U. S. 503, 10 L. ed 2d 513, 83 S. Ct. 1336.

The investigators were seeking answers and were determined to get them as in *Culombe* v. *Connecticut,* 367 U. S. 568, 6 L. ed 2d 1037, 81 S. Ct. 1860, where the Court said:

> ". . . that he cannot but have been made to believe what the police hardly denied, that the police wanted answers and were determined to get them."

and in *Spano* v. *New York,* 360 U. S. 315, 3 L. ed 2d 1265, 79 S. Ct. 1202 where the Court said:

"They (the police) were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny."

The confessions that went to the jury were not the first ones taken but their existence "was vitally relevant to the voluntariness of petitioner's later statements", *United States* v. *Bayer*, 331 U. S. 532, 540-541, 91 L. ed 1654-1660, 67 S. Ct. 1394 and *Beecher* v. *Alabama, supra.*

As Judge Tuttle said in the Amended Order, Circuit Court of Appeals for the Fifth Circuit:

"Also, the refusal of the custodial officers to permit his parents to visit him before he gave the second confession bring the case very close to the circumstances announced in the recent Supreme Court decision in Darwin v. Connecticut, 794 Misc. 36 Law Week, 3441." (Later reported as —— US ——, 20 L. ed 2d 630, 88 S. Ct. 1488)

As in *Beecher* at the time of the first two confessions Boulden had been ill and was suffering physical pain; he had also been denied medication; he had been threatened at gun point by the officers who first apprehended him and by a State Trooper at a later date prior to his confession.

It is easy for a mature, white, American citizen sitting in the security of his walnut paneled office to be mindful of his constitutional rights as to self-incrimination and his right to make no statement at all. The Totality of

Circumstances leaps to a far different conclusion when the defendant is a child, dull, is in jail, has never been in jail before, is cut off from his parents, is weak of body as well as mind, in pain, and is being induced by two large police investigators, who are skillful in the art of interrogation, and who have never advised the defendant of any right to remain silent but who are insistent that they want answers to their questions.

Clearly under the law as laid down in the above cited opinions of this Honorable Court, Boulden's confessions were coerced and involuntary and in violation of his constitutional rights.

II.

All Prospective Jurors in Petitioner's Case Who Indicated That They Were Opposed to Capital Punishment or That They Did Not Believe in It or Who Had a Fixed Opinion Against It Were Excused for Cause. Thus, Petitioner Was Tried by a "Hanging Jury" and His Constitutional Rights Were Violated.

In *Keifer-Stewart* v. *Seagram,* 340 US 211-215, 95 L. ed 219, this Honorable Court considered grounds presented for reversal not passed on by the Court of Appeals but which were argued orally and in briefs before the Court for the first time. In that case, as here, the grounds raised only issues of law not calling for examination or appraisal of evidence.

In the case at hand no examination or appraisal of the evidence is necessary. The record of the trial reads as follows:

"The Court: Do you have a fixed opinion against capital punishment or penitentiary punishment?

Redus C. Collier raised his hand.

The Court: What is your position on capital punishment or penitentiary punishment?

Mr. Collier: I don't believe in capital punishment.

The Court: State?

Mr. Hundley: Challenge.

The Court: Any questions, Mr. Chenault?

Mr. Chenault: No questions.

The Court: You are excused. Have a seat in the audience for the time being.

• • • • •

"Bradford W. Mixon: I have a fixed opinion against capital punishment.

Mr. Hundley: Challenge.

The Court: Defense?

Mr. Chenault: No questions.

The Court: Stand aside, Mr. Mixon.

• • • • •

"Fritz G. Holmes: I have a fixed opinion against capital punishment.

Mr. Hundley: Challenge.

The Court: Defendant?

Mr. Chenault: No questions.

The Court: You can stand aside.

• • • • •

"Claude Patton raised his hand.

Mr. Hundley: What do you base your opinion on, Mr. Patton?

Mr. Patton: I have a fixed opinion, and I don't believe in capital punishment.

Mr. Hundley: I'll challenge Mr. Patton on that answer, on the ground that he doesn't believe in capital punishment.

The Court: Any questions by the defendant?

Mr. Chenault: No questions.

The Court: We will ask that question later, but will let you stand aside.

* * * * *

"John L. Nelson raised his hand.

Mr. Hundley: Challenge.

The Court: Do you have a fixed opinion against capital or penitentiary punishment?

Mr. Nelson: Capital punishment.

The Court: You think you would never be willing to inflict the death penalty in any type case?

Mr. Nelson: Yes, sir.

Mr. Hundley: We challenge.

The Court: Defendant?

Mr. Chenault: No questions.

The Court: Stand aside, Mr. Nelson.

* * * * *

"E. O. Moon raised his hand.

The Court: Do you have a fixed opinion against capital or penitentiary punishment?

Mr. Moon: Capital punishment.

The Court: You mean you would never inflict the death penalty in any case?

Mr. Moon: That's right.

Mr. Hundley: Challenge.

The Court: Defendant?

Mr. Chenault: No questions.

The Court: Stand aside, Mr. Moon.

* * * * *

"Elymus G. Riley raised his hand.

The Court: Do you have a fixed opinion against capital or penitentiary punishment?

Mr. Riley: Capital punishment.

Mr. Hundley: Challenge.

Mr. Chenault: No questions.

The Court: Stand aside, you are excused.

• • • • •

"Neal Simpson raised his hand.

The Court: Do you have a fixed opinion against capital punishment?

Mr. Simpson: Yes, sir.

Mr. Hundley: We challenge.

Mr. Chenault: No questions.

The Court: Stand aside. You are excused.

• • • • •

"Henry H. Seibert raised his hand.

The Court: Do you have a fixed opinion against capital punishment?

Mr. Seibert: Yes, sir.

Mr. Hundley: We challenge.

The Court: Defendant?

Mr. Chenault: No questions.

The Court: Stand aside. You are excused.

• • • • •

"Arvle James Coury: I have a fixed opinion against capital punishment.

Mr. Hundley: We challenge.

Mr. Chenault: No questions.

The Court: Stand aside. You are excused.

• • • • •

"Fred E. Vickers stated he had a fixed opinion against capital punishment.

Mr. Hundley: We challenge.

Mr. Chenault: No questions.

The Court: You are excused.

• • • • •

"Hutchell Latham, Jr., raised his hand.

Mr. Doss: We challenge.

The Court: Is this a fixed opinion against capital punishment?

Mr. Latham: Yes, sir.

The Court: Defendant?

Mr. Chenault: No questions.

The Court: You are excused.

• • • • •

"Jesse Simmons: I have a fixed opinion against capital punishment.

Mr. Hundley: We challenge.

Mr. Chenault: No questions.

The Court: You are excused.

• • • • •

"Ray Mitchell: I have a fixed opinion against capital punishment.

Mr. Doss: We challenge.

Mr. Chenault: No questions.

The Court: You are excused.

• • • • •

"U. M. Rush raised his hand, stating he had a fixed opinion against capital punishment.

Mr. Hundley: Challenge.

Mr. Chenault: No questions.
The Court: Stand aside.

• • • • •

"Ossie Leeth raised his hand.
Mr. Hundley: We challenge.
The Court: Defense?
Mr. Chenault: No questions.
The Court: You are excused."

With two possible exceptions no attempt was made to determine whether these jurors who did not believe in "capital punishment" could return a verdict of death. Hence, under the holding of this Court in *Witherspoon* v. *Illinois*, —— US ——, 20 L. ed 2d 776, 88 S. Ct. ——, the State of Alabama has stacked the deck against the petitioner and to execute his death sentence would deprive this petitioner of his life without due process of law.

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed or in the alternative the death sentence imposed by the State of Alabama should be stayed forever.

Respectfully submitted,

William B. Moore, Jr.
Attorney for Appellant-Petitioner

In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 644

BILLY DON FRANKLIN BOULDEN,

PETITIONER

vs.

STATE OF ALABAMA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA
BRIEF AND ARGUMENT OF RESPONDENT

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SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT ON THE MERITS
BRIEF AND ARGUMENT OF RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Supreme Court of Alabama is reported as follows:

Billy Don Franklin Boulden v. State, 179 So. 2d 20.

The Order of the District Court, dated August 26, 1966, in the case of *Billy Don Franklin Boulden vs. William C. Holman*, Warden, Kilby Prison, is set out in the record (A. pp. 106-112) affirmed by the United States Court of Appeals for the Fifth Circuit, 385 F. 2d 102, rehearing denied 393 F. 2d 932. Writ of certiorari was granted October 14, 1968 (A. 126).

II

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the United States Court of Appeals for the Fifth Circuit, 385 F. 2d 102, rehearing denied 393 F. 2d 932. Petitioner applies under the provisions of Title 28, Section 1254(1), United States Code.

III

QUESTIONS PRESENTED

1. Whether the confessions made by petitioner, made on May 1, 2 and 6, 1964, were violative of the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Whether the reception into evidence of admissions against interest and purported confessions obtained after Boulden's arrest by the State at a time when petitioner was not represented by counsel deny him constitutional rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

3. Were Boulden's constitutional rights violated when prospective jurors were challenged by the State and excused pursuant to Title 30, Section 57, Code of Alabama 1940, as having a fixed opinion against capital punishment?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Sixth and Section 1 of the Fourteenth Amendments to the Constitution of the United States.

V

STATEMENT

Billy Don Franklin Boulden, petitioner, was convicted in the Circuit Court of Morgan County, Alabama, of the first degree murder of Loyd C. Hays and sentenced to death in accordance with the verdict of the jury. On appeal to the Supreme Court of Alabama the conviction was upheld. After denial of executive clemency, petition for a writ of habeas corpus was filed in the United States District Court, Middle District of Alabama. After a pretrial hearing, it was stipulated and agreed that the issue to be determined was whether the reception into evidence of admissions against interest and purported confessions obtained after Boulden's arrest and when Boulden was not represented by counsel denied him constitutional rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Habeas corpus was denied (A. pp. 106-112).

Appeal was taken to the United States Court of Appeals for the Fifth Circuit and the Order of the District Court was affirmed (A. pp. 113-120), 385 F. 2d 102, rehearing denied 393 F. 2d 932. The writ of certiorari was granted on October 14, 1968 (A. 126).

VI

SUMMARY OF ARGUMENT

1. Under the "totality of circumstances" rule, the confessions made by petitioner on May 1, 2 and 6, 1964, were voluntary and not violative of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

2. It is a good cause of challenge by the State that the person has a fixed opinion against capital or penitentiary punishment and the rule advanced in *Witherspoon v. Illinois* does not apply to Title 30, Section 57, Code of Alabama 1940.

OPINION

SUPREME COURT OF THE UNITED STATES

No. 644.—October Term, 1968.

Billy Don Franklin Boulden, Petitioner, v. William C. Holman, Warden.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 2, 1969.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner was convicted in the Circuit Court of Morgan County, Alabama, of first degree murder, and was sentenced to death in accordance with the verdict of the jury. After the Alabama Supreme Court affirmed the conviction, 278 Ala. 437, 179 So. 2d 20, the petitioner instituted this habeas corpus proceeding in the United States District Court for the Middle District of Alabama. District Judge Frank M. Johnson, Jr., denied relief, 257 F. Supp. 1013, and the Court of Appeals for the Fifth Circuit affirmed. 385 F. 2d 102, rehearing denied, 393 F. 2d 932, 395 F. 2d 169. We granted certiorari. 393 U. S. 822.

I.

Although there was substantial additional evidence of the petitioner's guilt, his conviction was based in part on a confession he had made some days after his arrest. His request for habeas corpus relief rested on a claim that the introduction of that confession into evidence violated his rights under the Constitution.[1] Since his

[1] Two confessions were in fact obtained, although only the second was actually introduced into evidence. Both the District Court and the Court of Appeals properly noted that the second confession might have been the "end product of the earlier" one, in that "the accused [may have been] acutely aware that he had earlier made admissions against his interest and was, therefore, merely repeating

VII

ARGUMENT

Petitioner argues that the opinion of the United States Court of Appeals for the Fifth Circuit is in conflict with applicable decisions of this Honorable Court. A reading of the cases cited compared with this case emphasizes that the Fifth Circuit Opinion follows the thinking and rulings of this Court.

The case now before this Court was tried prior to *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, and *Escobedo v. Illinois*, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, and the rulings thereon are inapplicable here. The totality of circumstances surrounding and leading to the confession must be considered in determining the crucial issue of voluntariness.

In *Spano v. New York*, 360 U. S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265, as to whether a confession was properly admitted into evidence, this Court stated:

> "As in all such cases, we are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement. Because of the delicate nature of the constitutional determination which we must make, we cannot escape the responsibility of making our own examination of the record."

That case was reversed because of the involuntary nature of the confession extracted from a 25 year old foreign born man with a history of emotional instability, a first offender who was questioned by a battery of skilled interrogators over a long period of time and then being tricked into a confession by a childhood friend on the police force.

Certain criteria used in determining voluntariness in cases governed by pre-*Escobedo-Miranda* standards and totality of circumstances were set out in the opinion of the Fifth Circuit.

> "In Brown v. United States, 356 F. 2d 230 (10 Cir. 1966), the criteria found to be relevant were the following: age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment; and the threat of mistreatment or inducement." (A. 118)

A confession was held to be coerced and its use, over accused's objection, before a jury in a state trial for murder denied him due process where evidence showed that a mentally dull 19 year old Negro was arrested without a warrant, denied a hearing before a magistrate where he could be advised of his rights, was not advised of his right to remain silent or his right to counsel, was held incommunicado for three days, was denied counsel and members of his family turned away, was denied permission to make a telephone call, and was denied food for long periods and threatened with mob violence. *Payne v. Arkansas,* 356 U. S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975.

Each of the cases cited by petitioner contain several of the criteria used to determine that the confession in *Payne v. Arkansas,* supra, was involuntary and its use violative of due process. A reading of *Beecher v. Alabama,* 19 L. Ed. 2d 35, shows Beecher was shot in his right leg, threatened with death, shot at again, signed confessions under influence of morphine, etc.

A reading of the transcript of the trial (R. pp. 17-38) and the habeas corpus hearing (R. pp. 488-728) cannot fail to convince this Honorable Court, as it did the District Court and the Court of Appeals for the Fifth Circuit, that the confessions were voluntary. Both these Courts considered

the confessions in the light of *Culombe v. Connecticut*, 367 U. S. 588, 81 S. Ct. 1860, 6 L. Ed. 2d 1037.

Incidentally, the second confession in the *United States v. Bayer*, 331 U. S. 532, 67 S. Ct. 1394, 91 L. Ed. 1654, was held to be voluntary and admissible.

It is noted that at the hearing held on the morning of May 2, 1964, petitioner was fully advised of his rights by Judge Bloodworth (A. pp. 6, 7). It is further noted that he had been advised of his rights by Captain Williams on May 1, 1964 (A. 45). At the habeas corpus hearing in the District Court the following question was asked and answered:

"Q. Captain Williams, I believe you stated earlier that you advised the defendant he didn't have to make a statement and that he was entitled to a lawyer; is that correct?

"A. I did.

"Q. On May 1?

"A. Yes, sir." (A. 45)

There is a further conflict in the evidence. The first time that any knowledge of headaches in the Athens Jail on May 1, 1964, was had at the hearing on August 23, 1966 (A. 38). But compare with his true condition by his recorded voice on May 1, 1964, as follows:

"Q. How are you doing Billy—set down right here. How do you feel Billy?

"A. Pretty good.

"Q. Huh.

"A. Pretty good." (A. 57)

Respondent submits that, applying the "totality of circumstances" rule, the voluntariness of statements, admissions and confessions was shown. There was no prolonged questioning of petitioner, no deprivation of food, water, cigarettes, sleep or toilet facilities to break down his physical strength and erode his will to resist. There was no showing of injury to petitioner during his interrogation. He had no headache on May 1, 1964, at 10:30 P.M. (A. 57) and first revealed this ailment on August 23, 1966 (A. 38). He was shown to be of average intelligence in his school. He had suffered a broken leg as a child which kept him from playing football and occasionally had a headache but was otherwise in good physical condition.

The contention that the parents were not permitted to visit their son at the Decatur Jail is without merit as Billy Don Franklin Boulden was incarcerated in the Athens Jail as a precautionary measure at the time. This distinguishes it from *Darwin v. Connecticut*, 20 L. Ed. 2d 630, 88 S. Ct. 1488.

The opinion of the District Court reflects that the confession made on May 1, 1964, was voluntary; that petitioner was not deprived of food, water, cigarettes, was not mistreated in any way; that he was removed to Athens as a precautionary measure and permitted to see his parents on May 2, 1964; that there was no credible evidence of any coercion, threats, or attempts to procure from Boulden an admission against his will nor any promise of leniency (A. 107, 108). The Court further found that the confession made on May 6, 1964, was voluntarily made after petitioner had been fully advised of his rights by Judge Bloodworth on May 2, 1964 (A. 111).

This ruling was made after a hearing on the merits lasting approximately one and a half days during which he saw and heard the witnesses and could evaluate their testimony as well as having the transcript of the trial.

The United States Court of Appeals applied the "totality of circumstances" rule and affirmed the District Court, holding both confessions were voluntary (A. 118). That Court reviewed the evidence and also concluded that Boulden's age and mental condition were not so unusual as to render the confession involuntary.

Petitioner argues that the trial court asked each group of prospective jurors if they had a fixed opinion against capital or penitentiary punishment, and upon their affirmative reply, were excused constituted reversible error in the light of *Witherspoon v. Illinois*, 88 S. Ct. ____, 20 L. Ed. 2d 776.

Title 30. Section 57, Code of Alabama 1940, provides:

> "Additional ground of challenge in certain cases in favor of State.—On the trial for any offense which may be punished capitally, or by imprisonment in the penitentiary, it is a good cause of challenge by the State that the person has a fixed opinion against capital or penitentiary punishments, or thinks that a conviction should not be had on circumstantial evidence; which cause of challenge may be proved by the oath of the person, or by other evidence."

The case of *Witherspoon v. Illinois*, 88 S. Ct. ____, 20 L. Ed. 2d 776, held, in substance, that the Illinois statute which permitted the State to challenge a venireman on the grounds that he had conscientious scruples against capital punishment or that he is opposed to the same was illegal and deprived the defendant of his constitutional rights. That case indicated it dealt only with the statute before it. This Honorable Court held:

> "The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt."

> Nor does it involve the State's assertion of a right to exclude from a jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them. For the State of Illinois did not stop there, but authorized the prosecution to exclude as well all who said they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it. . . . "

Webster's Dictionary defines "fixed" as "1. firm; not movable; 2. established; set. 3. steady; resolute; 4. obsessive; as, a fixed idea."

Certainly, there is much difference in having a *fixed opinion* against capital punishment and having conscientious scruples against capital punishment or being opposed to same. The Alabama term "fixed opinion against" obviously means just what the term implies, that under no circumstances would a juror impose capital punishment.

The *Witherspoon* case and the doctrine advanced therein is not applicable to the Alabama statute and the qualifications of the jury in the case now before this Honorable Court.

Abolition of the death penalty would clearly appear to be a state legislative function. Also, it is respectfully pointed out that Alabama provides the power to the Governor to commute a death sentence.

VIII

CONCLUSION

For the foregoing reasons, respondent submits that petitioner was indicted, tried, convicted and sentenced properly and that the constitutional rights of said petitioner were not violated. Therefore, the case should be affirmed.

Respectfully submitted,

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Counsel for Respondent

IX

CERTIFICATE

I, David W. Clark, one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7 day of January, 1969, I served a copy of the foregoing brief and argument of respondent on writ of certiorari upon one of the attorneys for petitioner, by mailing a copy in a duly addressed envelope to said attorney of record, as follows:

To: Honorable William B. Moore, Jr.
1201 Bell Building
P. O. Box 270
Montgomery, Alabama 36101

David W. Clark

DAVID W. CLARK
Assistant Attorney General
of Alabama

State Administrative Building
Montgomery, Alabama 36104

trial antedated our decisions in *Escobedo* v. *Illinois*, 378 U. S. 478, and *Miranda* v. *Arizona*, 384 U. S. 436, that claim is essentially a contention that under the constitutional standards prevailing prior to those decisions, his confession was made involuntarily. See *Johnson* v. *New Jersey*, 384 U. S. 719; *Davis* v. *North Carolina*, 384 U. S. 737.

After holding a full hearing regarding the issue and considering the state court record, the District Court, in an opinion applying the proper constitutional standards, was unable to conclude that the petitioner's confession was "other than voluntarily made." The confession, the court found, was "simply not coerced." 257 F. Supp., at 1017, 1016. The Court of Appeals, likewise applying appropriate standards, similarly could

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"his ostensibly unerasable [*sic*] words of confession." 385 F. 2d, at 106. See *Darwin* v. *Connecticut*, 391 U. S. 346; *Beecher* v. *Alabama*, 389 U. S. 35; cf. *United States* v. *Bayer*, 331 U. S. 532, 540. Consequently, in order to determine whether the second confession was properly admitted, they passed upon the voluntariness of the first as well as the second confession. We have considered the record in like fashion.

There is evidence that, even before his two formal confessions were obtained, the petitioner had, shortly after his arrest, admitted killing the deceased. The evidence was controverted, both as to whether the petitioner made any such admission and as to whether, if he did, the admission was voluntary. It is suggested in dissent that, because the opinions of the District Court and the Court of Appeals do not explicitly refer to that evidence, it must be assumed that those courts did not consider it, and that the conclusions they reached should therefore not be sustained. We cannot agree. The petitioner has consistently contended that the events immediately following his arrest contributed to the involuntariness of his later confessions, and we are unable to assume that the evidence referred to was not considered by the District Court and the Court of Appeals. In any event, our own decision with respect to the voluntariness issue has been reached with that evidence fully in mind.

"find from the record here no plausible suggestion that Boulden's will was overborne . . ." 385 F. 2d, at 107.[2]

Little purpose would be served by an extensive summation of the record in the District Court proceedings and in the state trial court. The question whether a confession was voluntarily made necessarily turns on the "totality of the circumstances"[3] in any particular case, and most of the relevant circumstances surrounding the petitioner's confession are set out in the opinions of the District Court and the Court of Appeals. Suffice it to say that we have made an independent study of the entire record[4] and have determined that, although the issue is a relatively close one, the conclusion reached by the District Court and the Court of Appeals was justified.

II.

In seeking habeas corpus the petitioner challenged only the admission of his confession into evidence, and his petition for certiorari was limited to that claim. In his brief and in oral argument on the merits, however, he has raised a substantial additional question: whether the jury that sentenced him to death was selected in accordance with the principles underlying our decision last Term in *Witherspoon* v. *Illinois*, 391 U. S. 510.

We held in *Witherspoon* that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U. S., at 522. In

[2] In affirming the petitioner's conviction, the Alabama Supreme Court had reached a like conclusion. 278 Ala., at 446–452, 179 So. 2d, at 28–34.

[3] *Fikes* v. *Alabama*, 352 U. S. 191, 197.

[4] See *Spano* v. *New York*, 360 U. S. 315, 316.

the present case, the record indicates that no less than 15 prospective jurors were excluded by the prosecution under an Alabama statute that provides:

> "On the trial for any offense which may be punished capitally, . . . it is a good cause of challenge by the state that the person has a fixed opinion against capital . . . punishmen[t] . . . ."[5]

That statutory standard has been construed by the Alabama Supreme Court to authorize the exclusion of potential jurors who, although "opposed to capital punishment, . . . would hang some men." *Untreiner* v. *State*, 146 Ala. 26, 33, 41 So. 285, 287.

However, as we emphasized in *Witherspoon*, "The critical question . . . is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors." 391 U. S., at 516, n. 9. "The most that can be demanded of a venireman in this regard," we said, "is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out . . . ." *Id.*, at 522, n. 21. We made it clear that "[u]nless a veniremen states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." *Id.*, at 516, n. 9.

It appears that at the petitioner's trial two prospective jurors were excluded only after they had acknowledged

[5] Ala. Code, Tit. 30, § 57.

that they would "never" be willing to impose the death penalty.* Eleven veniremen, however, appear to have been excused for cause simply on the basis of their affirmative answers to the question whether, in the statutory language, they had "a fixed opinion against" capital punishment. The following excerpt from the record is typical of those instances:

"THE COURT: Do you have a fixed opinion against capital punishment?

"MR. SEIBERT: Yes, sir.

"MR. HUNDLEY: We challenge.

"THE COURT: Defendant?

"MR. CHENAULT: No questions.

"THE COURT: Stand aside. You are excused."

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*"THE COURT: . . . Do you have a fixed opinion against capital or penitentiary punishment?

"JOHN L. NELSON raised his hand.

"MR. HUNDLEY: Challenge.

"THE COURT: Do you have a fixed opinion against capital or penitentiary punishment?

"MR. NELSON: Capital punishment.

"THE COURT: You think you would never be willing to inflict the death penalty in any type case?

"MR. NELSON: Yes, sir.

"MR. HUNDLEY: We challenge.

"THE COURT: Defendant?

"MR. CHENAULT: No questions.

"THE COURT: Stand aside, Mr. Nelson.

"E. O. MOON raised his hand.

"THE COURT: Do you have a fixed opinion against capital or penitentiary punishment?

"MR. MOON: Capital punishment.

"THE COURT: You mean you would never inflict the death penalty on [*sic*] any case?

"MR. MOON: That's right.

"MR. HUNDLEY: Challenge.

"THE COURT: Defendant?

"MR. CHENAULT: No questions.

"THE COURT: Stand aside, Mr. Moon."

Two other veniremen seem to have been excluded merely by virtue of their statements that they did not "believe in" capital punishment.[1] Yet it is entirely possible that a person who has "a fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.

It appears, therefore, that the sentence of death imposed upon the petitioner cannot constitutionally stand under *Witherspoon* v. *Illinois*. We do not, however,

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[1] "THE COURT: What is your position on capital punishment or penitentiary punishment?

"MR. COLLIER: I don't believe in capital punishment.

"THE COURT: State?

"MR. HUNDLEY: Challenge.

"THE COURT: Any questions, Mr. Chenault?

"MR. CHENAULT: No questions.

"THE COURT: You are excused. . . .

. . . . . .

"MR. PATTON: . . . and I don't believe in capital punishme

"MR. HUNDLEY: I'll challenge Mr. Patton on that answer, on the ground he doesn't believe in capital punishment.

"THE COURT: Any questions by the defendant?

"MR. CHENAULT: No questions.

"THE COURT: We . . . will let you stand aside."

As the initial portion of this colloquy and that set out in footnote 6 indicate, Alabama law also authorizes the exclusion of any potential juror who has a "fixed opinion against . . . penitentiary" punishment. Ala. Code, Tit. 30, § 57. Two veniremen were excused when they merely responded affirmatively to the disjunctively phrased question whether they had "a fixed opinion against capital or penitentiary punishment." It is thus not possible to discern from the record which type of punishment they objected to, although the more likely assumption would be that it was capital punishment. We did not in *Witherspoon* pass upon the validity of the "penitentiary" analogue to death-qualification of jurors, and we intimate today no opinion regarding that question.

finally decide that question here, for several reasons. First, the *Witherspoon* issue was not raised in the District Court, in the Court of Appeals,[8] nor in the petition for certiorari filed in this Court. A further hearing directed to the issue might conceivably modify in some fashion the conclusion so strongly suggested by the record now before us. Further, it is not clear whether the petitioner has exhausted his state remedies with respect to this issue. Finally, in the event it turns out, as now appears, that relief from this death sentence must be ordered, a local federal court will be far better equipped than are we to frame an appropriate decree with due regard to available Alabama procedures.

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court, where the issue that has belatedly been brought to our attention may be properly and fully considered.

It is so ordered.

MR. JUSTICE BLACK, while still adhering to his dissent in *Witherspoon* v. *Illinois*, 391 U. S. 510, 532, acquiesces in the Court's judgment and opinion.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

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[8] The Court of Appeals' decision was rendered prior to our decision in *Witherspoon*.

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The Court of Appeals' decision was handed down prior to our decision in *Witherspoon* [illegible]

SUPREME COURT OF THE UNITED STATES

No. 644.—October Term, 1968.

Billy Don Franklin Boulden, Petitioner, v. William C. Holman, Warden.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 2, 1969.]

Mr. Justice Harlan, whom The Chief Justice and Mr. Justice Marshall join, concurring in part and dissenting in part.

I agree that the case must be remanded to the District Court for a determination of the *Witherspoon* question, and I therefore join in Part II of the Court's opinion. However, I believe that on remand the District Court should also consider an aspect of petitioner's coerced confession claim which the opinions in the two courts below completely ignore, and to which this Court pays only passing attention.

The Court states that "two confessions were in fact obtained, although only the second was actually introduced into evidence." *Ante*, n. 1 The first of these was obtained during several hours of interrogation in the Limestone County jail on the night of petitioner's arrest, May 1, 1964. The second was obtained during petitioner's re-enactment of the crime on May 6. The courts below examined the circumstances in which both confessions were obtained, and concluded that both were voluntary. In my opinion this does not exhaust the coerced confession issue.

As the Court is compelled to recognize, petitioner made inculpatory statements on not two, but *three* different occasions. The first of these was on the *afternoon* of May 1, preceding the interrogation at the jail.[1]

[1] This appears not only from petitioner's and respondent's oral evidence at the habeas corpus hearing, but from the transcript of

On that afternoon, petitioner was apprehended by law enforcement officers near the scene of the crime. According to petitioner, an officer of the Highway Patrol approached him and asked his name:

> "I told him; then he told me to run because he had been wanting to kill him a nigger a long time . . . . [H]e told me to run, and then he throwed the rifle up like he was getting ready to shoot there." Record Transcript, pp. 539–540.

Petitioner was taken to the scene of the crime, where he was placed, in handcuffs, in a police car alone with Highway Patrol Captain Williams. He was not given any of the *Miranda* warnings.[2] As petitioner related:

> ". . . Captain Williams asked me what had happened, and I started to tell him; he cussed me and told me it wasn't . . . . I told Captain Williams I didn't

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the interrogation of the night of May 1, in which Captain Williams stated:

"Billy, now you understand what we are doing, we just want to talk to you, want you to tell us the truth about everything that happened today. *Now you know you talked with me today in the car and I just want you to repeat it all for Lt. Watts here . . . .*" Appendix, p. 57. (Emphasis added.)

[2] "The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made. . . . . Thus, the fact that Davis was never effectively advised of his rights gives added weight to the other circumstances described below which made his confessions involuntary." *Davis* v. *North Carolina*, 384 U. S. 737, 740–741 (1966).

It may additionally be noted that petitioner in the present case was a slight, sickly youth, with an I. Q. of 83.

do it, and he told me that I did . . . and he told me I was lying again. And he got mad and start cussing. . . . Well, he called me a little bastard and a few more names . . . . Then he told me if I didn't confess, that the officers that was wanting to kill me, he wasn't going to stop them. . . . I told him that if he would get me out of there and wouldn't let them bother me, I would confess."

Later, two other officers got into the back of the car. One of them "asked me how old I was, and I told him, and he told me I was old enough to die." Record Transcript, p. 544.

There were about 15 or 20 officers at the scene, some of whom were armed with rifles and shotguns. Captain Williams testified that a "pretty good size crowd" was gathering—"I would say, in my best judgment, twenty-five or thirty cars . . . and people milling around out in the road." Record Transcript, pp. 647–648. It was under these circumstances that petitioner first admitted to Captain Williams that he had committed the crime.

Apparently because of the hostile crowd, petitioner was finally carried away from the area in a convoy of three cars; he was taken to a jail in another county as a precautionary measure. Thereafter he made what the courts have treated as the "first" confession.

The District Court was not, of course, obliged to credit petitioner's testimony concerning the officers' threats—some of which, but by no means all, was controverted by respondent's witnesses. But the court did not even address itself to the testimony. Indeed, except for the oblique statement that "there was no evidence . . . that the protection afforded Boulden on this occasion was inadequate," 257 F. Supp. 1013, 1014 (1966); 385 F. 2d 102, 104 (1967), neither of the courts below alluded to, let alone examined, the circumstances or the factual and

legal consequences of the events occurring on the afternoon of May 1, 1964.[1]

Without speculating as to the possible explanations for this disturbing lacuna in the opinions below, I would broaden the remand of this case so as to allow the District Court to consider whether petitioner was subjected to improper coercion on the afternoon of May 1, and what effect the events of that afternoon had on the voluntariness of the confession introduced into evidence at petitioner's trial. See *Darwin* v. *Connecticut*, 391 U. S. 346 (1968); *id.*, at 350 (separate opinion).

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[1] In dissenting from the denial of rehearing *en banc*, Judge Tuttle, joined by Chief Judge Brown, focussed on this issue:

"It is clear that there was an illegal interrogation and inculpatory statement obtained from this prisoner immediately following the shooting and it is clear beyond doubt that in the eliciting of the confession subsequently admitted by the State court as a valid confession much stress was placed by the officers on the fact that Boulden had already confessed under the circumstances which I find completely impermissible. . . . Here, it is clear beyond doubt that what has been held to be a legal confession was obtained by officers repeatedly calling the accused's attention to the fact that he had already made sufficiently damaging statements and they merely wanted him to fill in the details." 395 F. 2d 169 (1968).